

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,)
)
Plaintiff,)
vs.)
GERALD JOHNSON, et al.,) CRIMINAL NO.: JKB-16-0363
)
Defendant.)
_____)

Transcript of Motions Hearing
Before the Honorable James K. Bredar
Tuesday, October 10th, 2017
Baltimore, Maryland

For the Plaintiff:

Peter J. Martinez, AUSA

Christina A. Hoffman, AUSA

For Defendant Gerald Johnson:

Paul F. Enzinna, Esquire

Jeffrey B. O'Toole, Esquire

For the Defendant Wesley Jamal Brown:

Harry J. Trainor, Jr., Esquire

Christopher M. Davis, Esquire

For the Defendant Montell Harvey:

William L. Welch, III, Esquire

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APPEARANCES (Cont'd)

For Defendant Kenneth Jones:

Alan R.L. Bussard, Esquire

For Defendant Marquise McCants:

John R. Francomano, III, Esquire

For the Defendant Joseph Bonds:

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P R O C E E D I N G S

THE COURT: Good morning. Be seated, please.
Mr. Martinez, you may call the case.

MR. MARTINEZ: Good morning, Your Honor. I call criminal case number JKB-16-363, this is United States versus Gerald Thomas Johnson, Wesley Brown, Montell Harvey, Kenneth Jones, Joseph Lawrence Bonds, Marquise McCants. This matter has been set in for a motions hearing. Peter Martinez for the government. With me at counsel table are AUSA Christina Hoffman and Special Agent Lisa Christy with the ATF.

THE COURT: Thank you. Appearances. Mr. Enzinna.

MR. ENZINNA: Your Honor, Paul Enzinna for Gerald Johnson, accompanied by Jeffrey O'Toole.

THE COURT: Hold on just a second. Good morning to you. And good morning, Mr. O'Toole. Good morning, Mr. Johnson.

Mr. Davis.

MR. DAVIS: Good morning, Your Honor, Christopher Davis on behalf of Wesley Brown, who's seated to my right.

MR. TRAINOR: And Harry Trainor, also on behalf of Wesley Brown.

THE COURT: Okay. Good morning to you, Mr. Davis. Good morning, Mr. Trainor. And good morning, Mr. Brown.

Mr. Welch.

MR. WELCH: Good morning, Your Honor. I am William

1 Welch, that's spelled W-e-l-c-h. I represent Mr. Harvey.
2 He's seated to my right.

3 THE COURT: Thank you. Good morning to you. And
4 good morning, Mr. Harvey.

5 Mr. Bussard.

6 MR. BUSSARD: Good morning, Your Honor. Alan
7 Bussard representing Kenneth Jones, who is to my right at the
8 trial table.

9 THE COURT: Thank you. And good morning to you.
10 And good morning to you, Mr. Jones.

11 Mr. Francomano.

12 MR. FRANCOMANO: Good morning, Your Honor. John
13 Francomano for Mr. Marquise.

14 THE COURT: And good morning to you, Mr. Francomano.
15 And good morning to you, is it Mr. McCants, Marquise McCants?

16 And then Mr. Ruter.

17 MR. RUTER: Your Honor, good morning. Gerald Ruter
18 on behalf of Mr. Bonds. Mr. Bonds is seated to my right.

19 THE COURT: Thank you. And Mr. Ruter, are you
20 sufficiently well accommodated back there?

21 MR. RUTER: Absolutely.

22 THE COURT: Okay. Thank you. And good morning to
23 you, Mr. Bonds.

24 All right. The matter comes on for the hearing on
25 pending pretrial motions in anticipation of our jury trial,

1 which is scheduled to begin on November the 13th, just a
2 little bit over a month from now. Just prior to the weekend,
3 the government, in correspondence, proposed a particular
4 sequence by which they suggested that the motions be taken up.
5 The Court reviewed that and responded with a letter drafted on
6 Friday, but because of an oversight on our end was not
7 docketed until this morning. I accept the proposed sequence
8 of motions, but our method will be that we hear the motion and
9 then we'll hear argument on that motion and decide that motion
10 and then move on to the next motion, or logical batch of
11 motions that relate to each other. So that's going to be the
12 sequence.

13 In light of that, the first matter before the Court
14 is the motion made, I guess by Mr. Bussard, which is the
15 motion to suppress the fruits of a warrantless arrest and
16 search of Kenneth Jones on April 11th of 2011. Is that where
17 you're expecting us to kick off here, Mr. Martinez?

18 MR. MARTINEZ: It is, Your Honor. And that's what
19 we indicated in our letter to the Court. I would add though,
20 that I spoke to Mr. Bussard before the proceeding began this
21 morning and he made me aware that there are five witnesses
22 under defense subpoena in connection with another one of his
23 motions, that's ECF 193, the motion to suppress in-court and
24 out-of-court identification by government witnesses. And so
25 with apologies, Your Honor, for the last minute curve ball, I

1 think what Mr. Bussard and the government are inclined to
2 propose to the Court is that in conjunction with the Court's
3 consideration of Mr. Jones's motions this morning, if we could
4 address that one initially because it's our position that one
5 can be decided on the papers and there's no need for witness
6 testimony. Then the five witnesses, the law enforcement
7 witnesses who Mr. Bussard has placed under defense subpoena,
8 can be released from those subpoenas so they don't have to sit
9 around for two days.

10 THE COURT: So this is not 194, which you're
11 agreeing does need to be heard and with respect to which
12 witness testimony needs to be taken --

13 MR. MARTINEZ: Correct.

14 THE COURT: -- but another paper. Mr. Jaco, you can
15 approach.

16 I remember this motion. Mr. Bussard, this is about
17 photo arrays?

18 MR. BUSSARD: That's correct, Your Honor. Your
19 Honor, I -- and the Court was gracious enough to issue Rule 17
20 subpoenas for some detectives.

21 THE COURT: Yes.

22 MR. BUSSARD: I have not seen any of those
23 detectives here today, and because it was a holiday weekend, I
24 didn't get a chance to communicate with the Marshal to see if
25 they had, in fact, been served, so I would like at least to

1 have time to see if those law enforcement officers have shown
2 up.

3 THE COURT: Mr. Martinez?

4 MR. MARTINEZ: Your Honor, that's news to me.
5 Mr. Bussard asked before the hearing that we tee up this issue
6 so that we could address it first. And as I said, it's our
7 position that testimony isn't necessary here. The Court can
8 decide the pending motion based on the legal arguments that
9 were presented in the papers.

10 THE COURT: Well, Mr. Bussard, I'll give you 30
11 seconds to peek in the hallway to see if anybody is out there.
12 Please go ahead.

13 MR. BUSSARD: Thank you.

14 (Pause in the proceedings.)

15 THE COURT: Mr. Bussard.

16 MR. BUSSARD: Your Honor, there is no one else in
17 the hallway.

18 THE COURT: All right. So certainly the Court's
19 ordinary procedure would be to grant enough time to allow the
20 subpoenas to be served and for the witnesses to be notified
21 and for the defendant to bring them here -- to get them to
22 court via this method. And that's the ordinary sequence of
23 things. But this is an argument about photo arrays; right?

24 MR. BUSSARD: Yes, Your Honor, and two photo
25 books.

1 THE COURT: Okay. So why wouldn't the questions
2 just turn on the arrays themselves and what the photos look
3 like? And to the extent that there are questions about how
4 the arrays were displayed, perhaps that could be the subject
5 of a stipulation. I don't suspect from reading the papers
6 that there are big disagreements about how the process was
7 conducted, more about the images that were used and
8 specifically whether or not your client had the right to have
9 other photographs in the array of persons who frequented the
10 Greenmount neighborhood.

11 MR. BUSSARD: That's accurate, Your Honor. There
12 was arrays challenged regarding Alexis Roberts, Christopher
13 Meadows, James Cornish, Lamontae Smith, and Angelique Petty.
14 The government has informed me that they will not be
15 proceeding with the Angelique Petty array. So that is no
16 longer the subject of a motion. Of the others, the only one
17 that I had an interest in and I believe a challenge, is the
18 Alexis Roberts. And the reason, if I may make a proffer, Your
19 Honor, is Ms. Roberts came into homicide headquarters on
20 October 16th, 2013 --

21 THE COURT: While we're having this colloquy, can we
22 get that particular array, is it a single array or is it a
23 photo book?

24 MR. BUSSARD: It's an array and there's also a photo
25 book that was provided by the government, undated, so I don't

1 know if it happened that day or some other day with
2 Ms. Roberts.

3 THE COURT: Can we at least get the array up on the
4 evidence presenter?

5 MR. BUSSARD: The challenge itself, Your Honor, is
6 not necessarily the array itself, the challenge itself is that
7 subsequent to October 16th, 2013, Ms. Roberts has testified
8 three separate times under oath in Mr. Johnson's state
9 proceeding, in Mr. Brown's state proceeding, and Mr. Jones's
10 state proceeding, and testified that she has no recollection,
11 one, of the night of the shooting; two, of being -- any
12 recollection of the photo array itself. Although, she
13 acknowledged that her signature was on the papers. And that
14 she was severely under the influence of drugs. In fact, she
15 testified she was under the influence of drugs most of the
16 time in 2013, to the extent that she has no recollection of
17 almost anything. That is our issue. That was not brought
18 out, necessarily, at Mr. Jones's trial.

19 THE COURT: How does that -- what's your point?
20 Your point is that the Court, on a pretrial basis, should
21 invalidate any statement or testimony that she might wish to
22 make before a jury because on other occasions she has
23 recanted, disclaimed, whatever.

24 MR. BUSSARD: It goes to credibility as much as
25 anything else. And the fact --

1 THE COURT: But that's not a constitutional attack
2 on the process that the government used, is it? It's just
3 that you are entitled to the totality of the evidence and
4 circumstances surrounding the claimed identification that the
5 witness made. And it sounds like you've got it, that you've
6 either through your own investigation or the government having
7 just provided it to you and turned it over as *Brady* or *Giglio*
8 or whatever, you know that she apparently, at least your
9 argument is, that she didn't come through with identifications
10 on other occasions, or denied having ever participated.

11 MR. BUSSARD: Denied having the ability to even
12 recall what she identified.

13 THE COURT: Okay.

14 MR. BUSSARD: It doesn't -- I don't have any -- I
15 will proffer to the Court, I don't have any evidence of any
16 improprieties on the part of the detectives in the
17 presentation. In fact -- well, this one wasn't, there was
18 some double blinds used, which really ensures that the
19 procedure is accurate. In this case it is just that
20 Ms. Roberts was under the influence, or appears to be, even on
21 the videos, appears to be under the influence of drugs. And
22 the detectives never even inquired on the interviews of
23 whether or not she was going through withdrawal at the time,
24 yet she had admitted later on during these -- the trials that
25 I've referenced, that in fact she was under the influence of

1 drugs. So from that point of view --

2 THE COURT: There's two different questions, okay.
3 The first is whether or not the government has committed some
4 sort of impropriety, or their agents have, such that the
5 remedy of suppression should be invoked and the evidence
6 should be excluded on that basis. That's question number one.
7 Question number two is, is any of this evidence relevant or
8 reliable? That's a different question. You know, was she so
9 inebriated that she's not credible, et cetera?

10 But we don't suppress evidence because of
11 reliability questions. We sometimes exclude it, perhaps, if
12 the government's unable to lay a sufficient foundation that
13 evinces some credibility or relevance of the evidence. But
14 I'm not going to do that in a pretrial hearing. If that
15 problem erupts and they're trying to get this in trial, sure,
16 we'll take it up. Today's focus is on the question of whether
17 or not the government engaged in some sort of impropriety,
18 whether the agents did something that violated your client's
19 constitutional rights and how they manipulated or managed this
20 photo array experience. So what's that?

21 MR. BUSSARD: The only issues I have are what's in
22 the pleading. One is that, Mr. Jones, who is in the upper
23 left-hand corner of that array, is the only person from
24 Greenmount. He's the only person that goes by the street name
25 or the nickname of Slay.

1 THE COURT: But there's no street names on this
2 array, agree?

3 MR. BUSSARD: No, there was just -- he is the only
4 person from the Greenmount Regime.

5 THE COURT: Okay.

6 MR. BUSSARD: Or the Greenmount Area of Baltimore
7 County -- Baltimore City, so it's a geographical argument.

8 THE COURT: So as I understand the argument,
9 Mr. Bussard, you're contending that there was something
10 inherently prejudicial or wrong, improperly suggestive about
11 displaying a photo array to a witness, in this case, who
12 presumably was familiar with the neighborhood. And in the
13 array there was only a picture of one person who was also from
14 the neighborhood, and that is your client. And that the other
15 five images that were used, young, bearded, African American
16 men, that they didn't come from that neighborhood. And you
17 seem to be implying that the problem or the issue is that,
18 well, there's just a greater chance that she would have
19 recognized the person, your client, just by virtue of the fact
20 that they both frequented the neighborhood, is that the point?

21 MR. BUSSARD: Yes, Your Honor.

22 THE COURT: Okay. My ruling is that that's an
23 insufficient basis for suppressing a photo array. That a
24 defendant does not have a right to have an array, that it not
25 only is not too suggestive in terms of the actual features of

1 the faces of the people displayed, but that the defendant has
2 a right that goes beyond that, which is to have a photo array
3 used that only displays images of, in this case, young,
4 African American, bearded men, who happen to also be from the
5 neighborhood. He's not entitled to that. That's a step too
6 far. And I understand the argument, and the motion to
7 suppress on that basis is denied.

8 What else is pending of your motion?

9 MR. BUSSARD: That's the only motion. There was two
10 photo books and we're submitting on those. I -- I don't have
11 any argument as to impropriety.

12 THE COURT: Well, do I need to look at the photo
13 books and consider the question of whether or not they're
14 impermissibly suggestive?

15 MR. BUSSARD: I'd be happy to show them to you, Your
16 Honor. They were also included, I believe, in the
17 government's exhibits, but I'd be happy to show them to you.

18 THE COURT: How many images are displayed in these
19 photo books?

20 MR. BUSSARD: Approximately 50 or 60.

21 THE COURT: How many photo books are there?

22 MR. BUSSARD: Well, three, one by Ms. Roberts,
23 undated.

24 THE COURT: Is your suggestion, again, that they are
25 deficient because they do not include images of others from

1 the Greenmount neighborhood? Or is it some other ground, are
2 there people, you know, who do not resemble the description
3 that was given of your client at all, wrong race, wrong
4 gender, wrong age, wrong facial hair, that sort of thing?

5 MR. BUSSARD: The photo shows or photo books
6 themselves are nothing but photographs turned over one at a
7 time. The government is right in their proffer and we are
8 proffering too, that on its face it doesn't appear to be
9 anything prejudicial to Mr. Jones as far as fail -- the photo
10 books themselves for the three that I'm mentioning. I'd be
11 happy to show them to you.

12 THE COURT: Well, if there's nothing prejudicial to
13 your client, then are you withdrawing the motion asking that
14 any identifications that are rooted in the -- those photo
15 books or related to them, are you withdrawing that or do you
16 still contend --

17 MR. BUSSARD: I want the Court's ruling, Your
18 Honor.

19 THE COURT: Okay. But I'm ruling in the
20 circumstance where you're telling me that the government is
21 correct in their position that there's nothing prejudicial;
22 true?

23 MR. BUSSARD: Yes, on its face.

24 THE COURT: Denied. Motion's denied. Is there any
25 other element of those motions that are, what, paper No. 193?

1 MR. BUSSARD: No, Your Honor, it's just that they
2 were separate identifications by the persons that I
3 outlined.

4 THE COURT: Got it.

5 MR. BUSSARD: With the same argument as to each
6 one.

7 THE COURT: Okay. But without any suggestion of
8 prejudice to your client being presented to the Court, I would
9 have no basis for a ruling that they are impermissibly
10 suggestive or otherwise constitutionally defective, such that
11 the remedy, the extraordinary remedy, of suppression is in
12 order. So in light of that, the motion's denied. Now, for
13 housekeeping purposes, are we just talking at this point about
14 paper No. 193?

15 MR. BUSSARD: Yes, Your Honor. The only argument I
16 would -- just to let you know, I know the Court's made a
17 ruling on it, is that in at least one of them there was a
18 presentation of Mr. Jones having a facial tattoo. I think
19 that was in the pleadings as well. That would be the only
20 issue of suggestibility.

21 THE COURT: So you are contending that there was an
22 element of impermissible suggestivity with respect to one of
23 the approximately 50 photo, photo books. And the suggestivity
24 that you note is that your client was depicted with a facial
25 tattoo and no one else in the lengthy array had a facial

1 tattoo, is that your position?

2 MR. BUSSARD: Not the photo book, but the array for
3 Mr. Lamontae Smith.

4 THE COURT: Okay. Let's put that array up.

5 MR. BUSSARD: And this one is not what is commonly
6 known as a six pack, Your Honor, so I have to show each one of
7 these. This is photograph one.

8 THE COURT: Tell me when your client is depicted.

9 MR. BUSSARD: Photograph 2, photograph 3 is
10 Mr. Jones with the facial tattoo under his left eye.
11 Photograph 4, photograph 5, and photograph 6.

12 THE COURT: No image. Thank you. Is that the
13 extent of the array?

14 MR. BUSSARD: Yes, Your Honor. It was presented in
15 a little bit different fashion than the other one, but those
16 are the six photographs that have been produced.

17 THE COURT: Thank you, Mr. Bussard. I appreciate
18 you showing me that array. I find that the facial tattoo that
19 you refer to, which is in the vicinity of your client's left
20 eye, is not a significant feature in the depiction of the six
21 images, that there were minor differences, certainly, among
22 each of the six pictures. They each display a different
23 person, but there's nothing about that particular tattoo,
24 especially in the way that these photos were displayed, that
25 particularly jumps out or serves to sort of greatly

1 distinguish that image from the other five. I find that they
2 were not -- that the array was not impermissibly suggestive.
3 Now, is there any other element of your motion that remains
4 pending?

5 MR. BUSSARD: No, Your Honor.

6 THE COURT: Okay. And is that all incorporated
7 within paper 193, Mr. Bussard?

8 MR. BUSSARD: Yes, Your Honor.

9 THE COURT: Does the government agree?

10 MS. HOFFMAN: Yes, Your Honor, if we could just
11 confirm for the record that the motion to suppress
12 identifications has been denied with respect to the arrays
13 completed by Christopher Meadows, Alexis Roberts, and Lamontae
14 Smith, then I think we have disposed of everything.

15 THE COURT: Mr. Bussard, that's now your position as
16 well as to the state of the record?

17 MR. BUSSARD: Yes, there's one other person, James
18 Cornish.

19 THE COURT: And that also is disposed of by virtue
20 of the Court's ruling. You agree, Mr. Bussard?

21 MR. BUSSARD: Yes, Your Honor.

22 THE COURT: Yes. All denied as to all of those
23 individuals.

24 Okay. Mr. Martinez, you're the grand choreographer
25 here in terms of what comes next.

1 MR. MARTINEZ: Yes, Your Honor. As we indicated in
2 our letter, we're now prepared to present witness testimony
3 relating to paper 194. That is also a motion by Mr. Jones and
4 that is a motion to suppress the fruits of a warrantless
5 arrest and search on April 11, 2011. We would be presenting
6 testimony from one witness, former Baltimore Police Detective
7 Austin Sailor, he's currently a special agent with the ATF.

8 THE COURT: Where is Agent Sailor physically?

9 MR. MARTINEZ: Outside.

10 THE COURT: Have him stay there for just one moment.
11 Mr. Bussard, please give me the briefest synopsis of your
12 position on this motion.

13 MR. BUSSARD: Your Honor, the testimony will be that
14 Detective Sailor, I believe he was the detective at the time,
15 was traveling westbound on East North Avenue around the
16 Greenmount cemetery. We have some maps to show the Court.

17 THE COURT: Is this the U-turn?

18 MR. BUSSARD: Yes, he made the U-turn and he saw a
19 person running away.

20 THE COURT: Yes.

21 MR. BUSSARD: That person is not -- he does not
22 recall --

23 THE COURT: Got it. I remember which motion, I just
24 needed -- I need a little bit of prompting with 50 pending
25 motions. I need little cues to help my memory, but I remember

1 which one this was. Okay. Let's bring him.

2 Please come forward, Agent, all the way to the front
3 of the Court, face our clerk. Right there.

4 THE CLERK: Good morning. Please raise your right
5 hand.

6 SPECIAL AGENT AUSTIN SAILOR,
7 called as a witness, being first duly sworn, was examined and
8 testified as follows:

9 THE WITNESS: I do.

10 THE CLERK: Thank you. You can have a seat. Please
11 state and spell your first and last name for the record.

12 THE WITNESS: Austin Sailor, A-u-s-t-i-n,
13 S-a-i-l-o-r.

14 THE CLERK: Thank you.

15 THE COURT: Your witness.

16 DIRECT EXAMINATION

17 BY MS. HOFFMAN:

18 Q Good morning, Agent Sailor.

19 A Good morning.

20 Q Where are you currently employed?

21 A I'm currently employed by the Bureau of Alcohol, Tobacco,
22 Firearms and Explosives.

23 Q What's your position with ATF?

24 A I'm a special agent.

25 Q How long have you worked for ATF?

1 A Since 29th of April, 2013.

2 Q And prior to that did you work for the Baltimore City
3 Police Department?

4 A I did.

5 Q How long did you work for BPD?

6 A Let's see, it was over -- I believe it was around six and
7 a half years. I was hired December 30th of 2005 and I left in
8 July of 2012.

9 Q And can you walk us through the various positions you
10 held with BPD?

11 A Yes. I started out in Northwest District Patrol. And
12 then I went to Specialized Units, Violent Crime Impact
13 Division. In the Eastern, it was given different names,
14 Violent Crime Impact Section. And then I was -- went to the
15 Violent Repeat Offender Unit and the Major Case Squad.

16 Q And as of 2011, where were you working?

17 A It was at that time the Violent Crime Impact Section.

18 Q What were your responsibilities in the Violent Crime
19 Impact Section?

20 A We were to go and basically make cases against violent
21 repeat offenders, targeting gun crimes, narcotics infractions,
22 things like that.

23 Q I'd like to draw your attention to April 11th of 2011. A
24 little after 7:00 p.m., were you working and on duty?

25 A I was. I was at the very tail end of my shift.

1 Q And where were you at that point in time?

2 A I was traveling westbound on East North Avenue.

3 Q And did something happen that caught your attention?

4 A It did. I was slowing down, I stopped at a stoplight on
5 East North Avenue, just east of Homewood Avenue, and still had
6 my -- all my windows rolled down, which I did whenever the
7 weather was appropriate. And at that time when I was stopped
8 at the stoplight, I heard a fight break out. It was a violent
9 altercation. I heard the blows being struck, sounded like
10 (indicating), like fists smacking on flesh. At that time I
11 looked over to my right, I was in the number two lane going
12 westbound, and I saw a six-person brawl going on in front of
13 906 East North Avenue.

14 Q Agent Sailor, I'd like to show you what's been marked as
15 Government's Exhibit No. 1. It should appear on your screen
16 right there.

17 A Yes.

18 Q Do you recognize this exhibit?

19 A Yes, I do.

20 Q And what is it?

21 A That's a picture of the location. The road on the
22 bottom, the south side is marked as -- correctly marked as
23 East North Avenue.

24 THE COURT: Why don't you circle that with your
25 finger, that will show up.

1 THE WITNESS: Where I was located, Your Honor?

2 THE COURT: No, just where it said North Avenue.

3 THE WITNESS: I'll do it over here so it's not --

4 THE COURT: It's not showing up?

5 THE WITNESS: Yeah, it's not showing up, Your
6 Honor.

7 THE COURT: See if the clerk can help you.

8 THE WITNESS: Am I doing something wrong?

9 THE COURT: All right. There's something wrong with
10 the screen. Please call IT, Ms. Herndon. Go ahead.

11 Q (BY MS. HOFFMAN) I was going to ask you, Agent Sailor,
12 to point out where you were at this point in time, but we'll
13 wait to get that working.

14 THE COURT: That could be a long wait. You better
15 come up with an alternative.

16 Q (BY MS. HOFFMAN) Where was the brawl taking place?

17 A It was right directly in front of 906 East North Avenue,
18 like directly around the steps in front of the dwelling.

19 Q And what did you do when you saw the brawl?

20 A I reached for my radio and I broadcasted that there was a
21 fight going on, something to that effect. I was trying to
22 keep it in view and then the light turned green. There were
23 vehicles in front of me and behind me, so I was kind of forced
24 to go. I didn't want to get out of my vehicle because at this
25 time I was by myself and I didn't want to get into the middle

1 of a six-person brawl by myself.

2 So at that time the -- I continued westbound and I'm
3 looking for a place to do a U-turn so I can keep everything in
4 sight, and right when I'm about to -- right at the time I'm
5 about to make a U-turn, I hear gunshots ring out.

6 Q What direction were the gunshots coming from?

7 A They were at this point right behind me, right where I
8 saw the brawl take place.

9 Q Were you able to turn your vehicle around?

10 A Yes. Right in the -- immediately west of Homewood Avenue
11 in -- I was still right there, there's almost a loop, a
12 circle, did a U-turn and then I saw an individual running
13 westbound wearing blue jeans, a white T-shirt, and a pink hat,
14 running westbound on the sidewalk of East North Avenue on,
15 let's say the north sidewalk. He then -- I observed him, he
16 was holding his dip area with his left hand and he --

17 Q What's the dip area, Agent Sailor?

18 A It's the waistband area of the pants.

19 Q And what did that indicate to you?

20 A We're trained as -- from our beginning training as a
21 Baltimore City Police, that that's demonstrating an armed
22 person.

23 Q Was this individual running from the direction of the
24 gunshots?

25 A Yes, ma'am, he was.

1 Q And what did you do when you saw him turn onto Homewood
2 Avenue?

3 A I then turned north onto Homewood Avenue, followed him,
4 catching up to him, and I kept him in sight the whole time.

5 Q And were you able to stop him?

6 A Yes, I was. I pulled up next to him. I was
7 approximately six feet away. Let's see if we can do it now.
8 Should I give it a try?

9 THE COURT: Yes, please.

10 A So I went here, the light was right there. And then I
11 did -- felt almost like doing a circle, and then continued up
12 northbound on Homewood Avenue. And I stopped him
13 approximately right there.

14 THE COURT: Make an X.

15 THE WITNESS: Approximately right there, Your
16 Honor.

17 Q (BY MS. HOFFMAN) And how did you stop him?

18 A I was still -- had my badge around my neck. I pulled up,
19 I was approximately six feet to the right of him. Just got
20 out of my vehicle, my door was between me and him. I
21 announced myself as police, something to the effect of "stop,
22 police, put your hands up." And because I believed he was
23 armed, I immediately drew my service weapon and pointed it at
24 him.

25 Q Were you later able to identify this individual?

1 A Yes, it was Mr. Kenneth Jones.

2 Q And is he sitting here in the courtroom today?

3 A He's the gentleman wearing blue over there.

4 MS. HOFFMAN: Thank you. I'll note for the record
5 that the witness has identified Kenneth Jones.

6 THE COURT: Yes, there are several people in what I
7 would call jail clothes, Agent, could you describe this
8 further for me.

9 THE WITNESS: He's wearing a blue shirt with a white
10 undershirt. Can I have that individual stand up, so --

11 THE COURT: Yes, please, Mr. Bussard, would you ask
12 the gentleman to your right to please stand.

13 THE WITNESS: So short cut hair, beard, mustache.

14 THE COURT: That's who you mean?

15 THE WITNESS: Yes, sir. Yes, Your Honor.

16 THE COURT: The record will reflect that this
17 witness identified the defendant, Mr. Jones.

18 Q (BY MS. HOFFMAN) Agent Sailor, when you identified
19 yourself as police and drew your service weapon, did the
20 defendant make any statements?

21 A Yes. He immediately said, "Don't shoot me, I have a
22 gun."

23 Q What did you do at that point?

24 A He put his hands up, and I said get down, and I pruned
25 him out, no force was needed or used. He was immediately

1 compliant. And I, you know, broadcasted out that I had, you
2 know, a person at gunpoint, you know, where I was. And I
3 could, you know, I was already hearing sirens coming to my
4 direction. So I just held him that way until I had backup
5 arrive.

6 Q And were there backup units that arrived?

7 A Yes, there were.

8 Q Was Mr. Jones placed in handcuffs?

9 A Yes, he was. I gave my handcuffs to the marked unit,
10 patrol unit that arrived, and they placed my handcuffs on
11 Mr. Jones.

12 Q And what did you do then?

13 A More backup arrived and at that time I used -- I patted
14 him down, I asked where's the gun, and he moved his left leg,
15 indicating to me that it was in his left leg, so I patted down
16 his left leg and I found a bulge, like in the calf of his
17 pants, which I recognized to be a handgun.

18 Q Were you able to remove that object?

19 A Yes. I -- because it was wedged so tightly in the pants,
20 I didn't believe that I could safely remove it, so I used a
21 pocket knife to cut the calf of the pants and removed it that
22 way.

23 Q Were you worried that the gun might accidentally go off
24 if --

25 A Yes. I didn't know anything about the type, the

1 condition of the firearm, and I didn't want to -- I was just
2 trying to as safely as possible remove this firearm.

3 Q I'm going to show you what's been marked as Government's
4 Exhibit 2A.

5 A Yes, that was a photograph taken of Mr. Jones as he was
6 prone out and how I cut his pants leg in order to remove the
7 firearm.

8 Q Thank you. And I'm going to show you now what's been
9 marked as Government's Exhibit 2B.

10 A Yes, and that's another angle showing how the firearm was
11 located in the pants leg.

12 Q And can you see the firearm there?

13 A Yes, you can see the handle, the butt of the revolver.

14 Q Was the firearm recovered?

15 THE COURT: Put a circle around it.

16 A (Complying.) Yes, it was recovered by Detective Hayes,
17 who was wearing gloves in order to, you know, protect any
18 fingerprint or DNA evidence.

19 Q (BY MS. HOFFMAN) And what kind of firearm was it?

20 A It was a Taurus, a black Taurus revolver, I believe it
21 was a .357.

22 Q Was it loaded?

23 A Yes, it had one live round and four spent shell
24 casings.

25 Q Was a sample collected to test for gunshot residue?

1 A Yes, a crime tech, Baltimore City crime technician, came
2 and responded to that location and collected samples on
3 scene.

4 Q Were Miranda warnings delivered to Mr. Jones?

5 A Yes, they were.

6 Q And did Mr. Jones make any statements?

7 A He -- I remember him saying that he understood his
8 Miranda warnings. And then later on while I was basically
9 handling the firearm, running it, he made a statement a few
10 feet away from me to Lieutenant Miller.

11 Q Was there anything that provoked the statement?

12 A Lieutenant Miller came to the scene after everything,
13 Mr. Jones was still there in handcuffs, and Lieutenant Miller
14 said --

15 MR. BUSSARD: Objection, Your Honor.

16 THE COURT: Basis?

17 MR. BUSSARD: As to what Detective Miller said.

18 THE COURT: Yes, but it's a motions hearing.

19 MS. HOFFMAN: It's not being offered for the truth
20 of the matter.

21 THE COURT: Well, first -- yes, that's a separate
22 question, but the Federal Rules of Evidence govern in a
23 motions hearing, Mr. Bussard?

24 MR. BUSSARD: Yes, Your Honor.

25 THE COURT: They do or they don't?

1 MR. BUSSARD: They do.

2 THE COURT: Do you have authority for that?

3 MR. BUSSARD: No, they don't, I mean. Hearsay is
4 admissible.

5 THE COURT: Thank you. So first of all, whether
6 it's being offered for the truth of the matter asserted or
7 not, it's admissible regardless in this motions hearing and
8 issues that you might have in that regard go to weight, and
9 they may well go to weight. Overruled. You may answer.

10 A Thank you. Lieutenant Miller arrived on scene and said,
11 "Is this the suspect in the shooting?" and --

12 Q (BY MS. HOFFMAN) Who was he directing that question
13 to?

14 A It wasn't me, it was one of the other detectives. I
15 don't know because I was focused on the firearm at that time.
16 And in response to that, Mr. Jones said something to the
17 effect of "he had a gun and shot at me first."

18 Q Did you remain on the scene much longer after that?

19 A Not that much longer, no. I -- let's see, Detective
20 Kinley responded and he took possession of the firearm, the
21 evidence. And I then went back to the Eastern District and
22 began writing my record about the handgun violation.

23 Q Your shift was over at that point?

24 A Correct.

25 Q Did you ever respond to the scene of the actual

1 shooting?

2 A No, I did not.

3 MS. HOFFMAN: I don't have any further questions
4 for the witness.

5 THE COURT: Cross-examination.

6 CROSS-EXAMINATION

7 BY MR. BUSSARD:

8 Q Good morning, Agent Sailor.

9 A Good morning.

10 Q We met out in the hallway briefly.

11 A Yes.

12 Q I want to ask you to describe in a little bit more detail
13 the general area that we've been talking about.

14 A Sure.

15 Q You're westbound on East North Avenue; is that correct?

16 A Yes, sir.

17 Q And North Avenue is essentially a four-lane road, two
18 lanes going east, two lanes going west; is that correct?

19 A Yes, sir.

20 Q And there is a parking lane on the right side, to your
21 right as you're traveling westbound; is that correct?

22 A Yes, sir.

23 Q And these are essentially residential-type neighborhoods,
24 they're row houses?

25 A Yes, sir. It's row houses on the north side of that part

1 of North Avenue and the cemetery is on the south side.

2 Q And that cemetery runs the entire length of, at least the
3 area we're talking about, all the way down to Greenmount
4 Avenue?

5 A Yes, sir.

6 Q And now, you said that you were stopped for the red light
7 at 906 East North Avenue; is that correct?

8 A Correct.

9 Q And there is a cross street near 906 Oak Hill; is that
10 correct?

11 A I would have to review the picture.

12 Q Showing you --

13 A I know there was a cross street, but I don't recall what
14 the name is. It's been a few years since I've been back in
15 Baltimore.

16 Q Excuse me. Showing you what's been marked as Kenneth
17 Jones Exhibit No. 1.

18 MR. BUSSARD: Your Honor, a copy was provided to
19 you.

20 THE COURT: It's fine, just put it up.

21 Q (BY MR. BUSSARD) And I hope I can make this a little
22 bigger. It's not as good looking as the government's.

23 THE COURT: Go down, get the cemetery in there.

24 Q (BY MR. BUSSARD) Do you see the balloon there?

25 A Yes.

1 Q Where my pen is?

2 A I like the other picture better, but I can see this
3 one.

4 THE COURT: Can you pull it down so North Avenue is
5 at the bottom of the screen so we can see the cross street
6 names.

7 MR. BUSSARD: It may not show up -- I know one of
8 the other pages --

9 Q (BY MR. BUSSARD) I'm showing you Defense Exhibit 1 and
10 it is A through L and we will have Oak Hill in there. So this
11 is 906; is that correct?

12 THE COURT: Well, it's hard -- I don't think that's
13 a fair question without us being able to see the cross
14 streets. Maybe we have an agreement as to which streets are
15 which.

16 Q (BY MR. BUSSARD) Would you agree this is North Avenue?

17 A Yes.

18 Q And you would agree that this is Greenmount Avenue?

19 A Yes.

20 Q Running north-south. I'm going to show you some other
21 pictures, I think this will become clear. Or I can show you
22 Government's Exhibit --

23 A I would prefer the government exhibit.

24 Q Government's Exhibit 1. And the red balloon that I'm
25 pointing to, is that 906?

1 A Approximately, yes.

2 Q So the first cross street, if someone was traveling
3 westbound from 906, they would come to Oak Hill; is that
4 correct?

5 A Correct.

6 Q And Oak Hill intersects -- a T-intersection with East
7 North Avenue; is that correct?

8 A Yes.

9 Q And there's no traffic control device at Oak Hill; is
10 that correct?

11 A Not that I remember.

12 Q Now, down here, the next intersection is Homewood Avenue;
13 is that correct?

14 A Yes.

15 Q And that is the traffic control device that you are
16 speaking about?

17 A Right. And I found it strange that night that there was
18 still a pretty good amount of traffic on the road and that
19 vehicles were backed that far up, that I was stopped all the
20 way back, you know. I don't know if there was something going
21 on westbound -- you know, to the west of the location or what.

22 Q So where my pen is, is the traffic control device?

23 A Yes.

24 Q And you were saying you were approximately a block and a
25 half?

1 A Like a block, which I found unusual.

2 Q The block between Homewood and Oak Hill?

3 A Yes.

4 Q And then a partial block to 906?

5 A Correct.

6 Q So you would agree you were located about here?

7 A Approximately.

8 Q Would you circle that just for --

9 A (Complying.)

10 Q And when you say lane 2, is that what --

11 A Lane number one is closest to the median divider, the
12 center of the road. So I was number two, closer to the
13 sidewalk.

14 Q And again, Oak Hill is that first intersection?

15 A Correct.

16 Q Running north; is that correct?

17 A Correct.

18 Q Showing you what's been marked as -- this is part of
19 Defense Exhibit 1. Is this an accurate depiction of the row
20 houses in the 900 block of East North Avenue?

21 A I -- it's not the clearest picture, but -- it looks like
22 it roughly could be. But if those are the same types of
23 structures and stairwells and stairs in front.

24 Q Showing you Defense Exhibit 1C. I was hoping to make
25 that big. And is that the view of looking westbound on East

1 North Avenue?

2 A Is that the cross street there?

3 Q If this is Oak Hill --

4 A That's Oak Hill, then --

5 Q This is 906. And this is --

6 THE COURT: Well, perhaps there's just an agreement
7 between government counsel and defense counsel that is what
8 that depicts, because I don't know how you can ask the witness
9 to -- one thing about Baltimore is that a lot of areas look
10 the same, so --

11 Q (MR. BUSSARD) Would you agree this looks like the
12 cemetery, Greenmount Cemetery, on the left?

13 A Yes.

14 Q Showing you -- again, a little bit further down, does
15 this resemble the area -- is this a depiction of the
16 intersection of Homewood and North Avenue showing the traffic
17 device over here?

18 A It's hard to see on the picture, but roughly -- you know,
19 roughly it looks like it, but it's not the greatest picture.

20 THE COURT: Are you asking him to assume that it is?

21 MR. BUSSARD: Asking general --

22 THE COURT: I'm asking you, are you asking the
23 witness to assume that that's a depiction of North Avenue and
24 Homewood?

25 MR. BUSSARD: Yes, Your Honor.

1 THE COURT: Okay. Make that assumption.

2 THE WITNESS: Okay.

3 Q (BY MR. BUSSARD) Showing you what's been marked as
4 Defense Exhibit 1E, is this a view looking north on Homewood
5 Avenue, to the best of your recollection?

6 A To the best of my recollection, it is.

7 Q And that's the street that you eventually stopped
8 Mr. Jones; is that correct?

9 A Yes, sir.

10 Q Aerial view, this is 1F and this is a black and white of,
11 essentially the same as Government's Exhibit 1. I won't spend
12 a lot of time.

13 This is a little bit more of a close up -- back
14 up -- if we assume this is 906 right here -- I'm sorry, over
15 here.

16 A Okay.

17 Q And if this is facing north, this would be Oak Hill; is
18 that correct?

19 A If that's how you describe it, then that's correct.

20 THE COURT: So if that white colored roof row house
21 is 906, then the cross street you're seeing would be Oak Hill,
22 that's what you're telling us?

23 THE WITNESS: Yes.

24 Q (BY MR. BUSSARD) Here's a view looking east on North
25 Avenue.

1 A Okay.

2 Q And do you know -- it's not very clear, do you know what
3 this building is here, Agent Sailor, is that the Poet's
4 Athletic Club?

5 A I believe it says Poet's Athletic Club.

6 Q And that is in the same block as the 906?

7 A It appears to be.

8 Q And the street sign then indicates Oak Hill Avenue; is
9 that correct?

10 A It does.

11 Q And that's the first intersection traveling west from
12 906?

13 A I believe so.

14 Q Showing you Defense Exhibit 1I, it's more of the same
15 there, the same location looking from Oak Hill. Is that your
16 recollection of that area?

17 A That is my recollection.

18 Q This is 1J. I'm not sure why it's --

19 THE COURT: So we're a bit pressed for time,
20 Mr. Bussard, where are we headed?

21 MR. BUSSARD: I just wanted to make sure we're
22 talking about Oak Hill Avenue there.

23 Q (BY MR. BUSSARD) Is that Oak Hill, Agent Sailor?

24 A It appears to be via Google maps.

25 Q 1K, looking at Oak Hill Avenue?

1 A That's how it shows on Google maps.

2 Q Then the last, you indicated you made the stop on
3 Homewood Avenue at approximately 20th Street; is that
4 correct?

5 A Homewood is just around that -- passed that alley before
6 the next road.

7 Q Passed this intersection, so down here where my pen is
8 showing is Greenmount Cemetery and North Avenue?

9 A Okay.

10 Q Looking south.

11 A Okay, I see where we are now.

12 Q Is this the general area then of 20th and Homewood?

13 A It appears to be.

14 Q Now, you indicated you were on routine patrol, there was
15 no reason for you to be over at the East North Avenue location
16 otherwise?

17 A Right.

18 Q You were not on any specific call?

19 A No.

20 Q Correct? And you indicated the traffic control device
21 was red at Homewood and that was a little bit unusual;
22 correct?

23 A No, it's not unusual, what was unusual is, I thought that
24 it was unusual that there were so many cars, that it was
25 backed up for over a block, you know, at that time of night,

1 that normally at that time of night there's less traffic. I
2 just didn't think it was -- I thought it was abnormal I would
3 be backed up so far due to just a red light.

4 Q Oh, I'm sorry. And you indicated that you were
5 stationary and had the windows down?

6 A Yes.

7 Q And your attention was drawn to your right by a sound; is
8 that correct?

9 A Yes.

10 Q So as you're coming to a stationary stop, there's nothing
11 that you recall as drawing your attention to your right before
12 then; is that correct?

13 A Correct. The first -- what drew my attention was that
14 smacking (indicating) sound.

15 Q And did you also hear some hollering going on?

16 A Yes, there was hollering and screaming and yelling.

17 Q I don't think this was brought out by the government, you
18 were in a plain unit?

19 A Right, I was in plain clothes at the time.

20 Q And the unit itself, the vehicle was not a marked --

21 A Correct, and it didn't have lights or sirens or anything
22 like that.

23 Q And as the light turned red -- green, you started to
24 move?

25 A Right, because I was trying to go with the free flow of

1 traffic while simultaneously broadcast things on the radio and
2 trying to find a place to immediately pull a U-turn safely.

3 Q Is it fair to say, thinking back to the -- well, I'll
4 stay in the sequence. You testified that you were looking for
5 a place to make a U-turn; correct?

6 A Right, that I was trying to do my best to do whatever I
7 needed to do to keep the incident in sight so I could direct
8 other units to that location.

9 Q And the U-turn was already passed the intersection of
10 Homewood and 20 -- Homewood and North where the traffic
11 control device was?

12 A Immediately west of Homewood.

13 Q Now, as you were traveling from the area of 906 East
14 North Avenue down to the intersection of Homewood and North,
15 you did not observe anyone running along the sidewalk until
16 you made the U-turn; is that correct?

17 A Correct.

18 Q And to the best of your recollection, when you looked to
19 your right in response to sound of the altercation, you have
20 no recollection of someone wearing a pink neon hat?

21 A I don't recall that, mainly because it was such a chaotic
22 scene with basically bodies flying and it was hard to, you
23 know, my attention at that point was divided between all six
24 parties, and also traffic, you know, in front of me and behind
25 me. So no, I don't recall seeing someone of that description,

1 of that instant --

2 Q And you have no recollection of seeing Mr. Jones at the
3 altercation?

4 A I do not.

5 Q Now, when you said you started to move, you had -- you
6 heard gunfire; correct, what you thought was gunfire?

7 A Yes.

8 Q And you said it was rapid fire gunfire?

9 A Yes.

10 Q And I believe at a prior proceeding, last year, you
11 indicated that it sounded like automatic gunfire to you?

12 A Well, I used that term, but by automatic fire, I mean a
13 high rate of rounds being discharged very quickly. And from
14 my knowledge of firearms, that can be done any number of ways,
15 whether it's an automatic weapon or just, you know, from
16 someone pulling the trigger very quickly. So I did not mean
17 to say that, you know, that it was at that particular time I
18 knew what type of weapon was used. It was just that I was
19 trying to demonstrate how quickly the gunfire happened.

20 Q So is the answer yes, that it sounded like automatic
21 fire?

22 A It sounded like very fast fire.

23 Q Now, the weapon that was ultimately recovered from
24 Mr. Jones was not an automatic weapon?

25 A No, it was a revolver.

1 Q And it was a five-shot revolver?

2 A To my recollection it was.

3 Q It was a .357?

4 A Yes.

5 Q And after the U-turn, it's your testimony that Mr. Jones,
6 or the man in the pink hat, was running towards you?

7 A Yes.

8 Q Correct? And you said you were in an unmarked unit;
9 correct?

10 A Yes.

11 Q And the person running towards you made a right turn onto
12 Homewood Avenue; correct?

13 A Correct, running northbound.

14 Q And he was running up Homewood Avenue?

15 A Correct.

16 Q Now, you indicated in response to the government's
17 questions that the individual appeared to be holding his waist
18 area; is that correct?

19 A That is correct.

20 Q I think you used the term "dip"?

21 A Yes.

22 Q And you indicated through your training, knowledge, and
23 experience as a Baltimore City police officer, you believed
24 that that person was armed at that point?

25 A Yes.

1 Q As a Baltimore City police officer, especially in 2011,
2 you've had occasion to arrest people for drug offenses and
3 what have you?

4 A Drug offenses, numerous -- numerous drug offenses,
5 firearm offenses.

6 Q And so guns are not the only thing that are carried in
7 someone's dip, so to speak, there are drugs that are also
8 carried there on occasion. So if someone is holding that
9 area, they're trying to hold it in place; is that right?

10 A I would say that's right, but that's somewhat misleading,
11 because like I said, from the very early parts of training,
12 because of the weight of firearms, we're trained to look for
13 people holding their dip area because firearms -- I've seen
14 them literally fly out of people's pants, go down people's
15 pants. Because of the weight of the firearm, people a lot of
16 times when they are -- their firearm's in the dip area, they
17 hold that area with their hand.

18 Q So you see the man in the pink hat holding his waist
19 area; correct?

20 A Yes.

21 Q You didn't see any movement of trying to force that gun
22 down his left leg?

23 A No.

24 Q And you indicated that upon encountering Mr. Jones the
25 .357 was encountered -- was wedged, I think was your word,

1 wedged tightly in his left shin area; is that correct?

2 A Correct. And what I took to happen as --

3 Q I'm just asking a yes or no question.

4 A Repeat the question, please, sir.

5 THE COURT: You may explain.

6 THE WITNESS: What I took to happen as -- was that
7 when he removed his left hand from his dip area and put his
8 hands up, the firearm then slid down his left waistband area,
9 down his pants leg. And that's where it was recovered.

10 THE COURT: Were the trousers loose enough that that
11 could have happened?

12 THE WITNESS: They were just -- I believe so, and
13 there was just -- going from the wide waist area to the
14 thinner calf part of the pants, that the size, the bulk of the
15 firearm, then stuck in the calf area.

16 MR. BUSSARD: Court's indulgence one moment.

17 Q (BY MR. BUSSARD) Now, you had occasion after this arrest
18 to write a couple reports; is that correct?

19 A Yes, sir, I did.

20 Q And one of those reports was a statement of charges for
21 the possession of the handgun?

22 A Yes, sir, I did.

23 Q And you also wrote an incident report, Baltimore City
24 Police incident record on the defendant?

25 A Yes, I did.

1 Q Do you recall -- I'd be happy to show it to you.

2 A That would be helpful.

3 Q -- whether he made any statement in those reports that
4 you noticed that the gun slipped -- the word "slipped," down
5 his left shin?

6 A No, I didn't.

7 Q You did not make that statement?

8 A No.

9 Q And, in fact, the only statement you made is when you
10 encountered Mr. Jones is that he -- that you found the gun
11 lodged, I think was the word?

12 A Correct, and the reason I did that is because I can't see
13 through his jeans, you know, I believe I had reasonable
14 suspicion that, you know, he was holding a firearm in place,
15 but you know, I can't see through blue jeans.

16 Q So you're making an assumption that, based on your
17 training, that that's what you thought he was carrying?

18 A Correct, because of my training, knowledge, and
19 experience.

20 Q When he was running -- backing up just for a moment, and
21 you first see Mr. Jones running and he's running westbound on
22 East North Avenue on the sidewalk, did he attempt to be
23 putting a weapon away in his waist --

24 A I didn't see any weapon at that point. He was just
25 holding his dip area with his left hand.

1 Q And he is running not knowing that you are a police
2 officer?

3 A I believe that is the case.

4 Q And when you encountered Mr. Jones at around the
5 intersection of 20th and Homewood Avenue, you said you were
6 about six feet away from him; is that correct?

7 A Yes.

8 Q And you were still in the unmarked unit obviously?

9 A Correct.

10 Q And when you say you had your badge displayed, is that
11 simply about a two-inch square --

12 A I had my physical badge on a necklace around my neck.

13 Q So there's nothing on the car itself, the automobile,
14 that says Baltimore City Police or Baltimore Police
15 Department?

16 A Correct, at that time --

17 Q And there's nothing -- you're not wearing a coat that has
18 "Police" in big letters across --

19 A No, I just had my badge displayed.

20 Q So you have this small badge and you get out of the car
21 and you have your gun drawn?

22 A Yes.

23 Q And when you say get down, and probably some other things
24 as well, Mr. Jones --

25 MR. MARTINEZ: Objection.

1 Q (BY MR. BUSSARD) -- immediately stopped; is that
2 correct?

3 THE COURT: Overruled.

4 A I pulled up next to him, I said police, you know, show me
5 your hands. And then, you know, when he showed me his hands,
6 he said don't shoot, something of the effect, don't shoot, I
7 have a gun, then I immediately ordered him to prone himself
8 out, lie down on the ground.

9 Q (By MR. BUSSARD) So time-wise, you pull up beside him
10 and you immediately bark some orders to him and he stops
11 running?

12 A Exactly. He appeared to be shocked, his eyes were wide.
13 It seemed like I genuinely surprised him when I pulled up next
14 to him and did that.

15 Q And your weapon was clearly displayed?

16 A Oh, yes, it was pointed at him, I believed he was
17 armed.

18 Q Now, the jeans that Mr. Jones was wearing, were they the
19 jeans that were in style back then, baggy jeans that were worn
20 low on the hips?

21 A Uh --

22 Q Do you have a recollection of that?

23 A From my recollection, but I do not ever claim to be the
24 most stylish person, and they just appeared like regular blue
25 jeans to me. I'm not the person you want to ask about stylish

1 clothing, sir.

2 Q But you are familiar with persons in Baltimore City --

3 A Yes, they appeared to be common blue jeans.

4 Q And obviously tight around the shin area because you --
5 the weapon didn't fall out, did it?

6 A I mean, they were just normal blue jeans, but the gun was
7 of such a size that it just -- when it fell it must have
8 gotten stuck in there.

9 Q But did you even try to pull it out?

10 A I could tell just from my search that it was so snug in
11 there that I did not want to mess with -- I did not want to
12 alter the position of the firearm in any way. I didn't know
13 if the hammer was cocked back, I didn't know what type of
14 firearm I'm dealing with. I'm trying to be as safe as
15 possible. I did not want to cause an accidental discharge and
16 shoot anybody.

17 Q And as we sit here today and you think back on to that
18 moment, you have no knowledge at all and you're not telling
19 this court, you didn't know whether that gun had been lodged
20 in his left shin area all along as he was running, you
21 don't --

22 A No, I don't know that.

23 MR. BUSSARD: I don't have any further questions.

24 THE COURT: Thank you. Agent Sailor, you can step
25 out of the courtroom. Are there any other witnesses for the

1 government?

2 MS. HOFFMAN: No, Your Honor, not on this motion.

3 THE COURT: Mr. Bussard, do you have any witnesses?

4 MR. BUSSARD: No, Your Honor.

5 THE COURT: I'll hear you on the motion,
6 Mr. Bussard. Argument.

7 MR. BUSSARD: Your Honor, thinking about the law
8 and -- would you prefer I argue from --

9 THE COURT: Your preference.

10 MR. BUSSARD: I can stay here. A warrantless arrest
11 and warrantless encounters by police and citizens, Your Honor,
12 the lead case is, at least in this, is *Illinois v. Wardlow*,
13 which is different and distinguishable from this case because
14 when the police in that case appear, they are in a marked unit
15 and it's clear that they're in a marked unit and the young man
16 seeing that marked unit runs away and responds to seeing this
17 police, and so the distinguishing factor is they eventually
18 encounter him and seize him and they find whatever it is
19 there.

20 In this case there is -- all they have is a person
21 not known to Detective Sailor to have been involved in the
22 altercation, not obviously carrying a weapon, wearing a very
23 bright pink hat, he has no recollection of even being involved
24 in the altercation at 906, running down the street. And the
25 difference is when he encounters from six feet away with his

1 gun drawn, Mr. Jones does not try to run any further. He
2 stops, complies, gets on the ground, and then there is a
3 search, which results in -- it's more than just a pat down,
4 it's a search and he has to cut out the gun, which the word
5 that's always been used is "wedged" or "lodged" in his left
6 shin area of his jeans.

7 There is no indication at all other than the
8 detective may believe so, that this gun may have slipped down
9 when he was running, when Mr. Jones was running and carrying
10 his left hand around the waist area, that he's holding that
11 gun. There is no evidence that that gun was there, so it is
12 merely supposition as to whether or not this person that Agent
13 Sailor or Detective Sailor saw at the moment was in fact armed
14 at the moment. Thus, whether he has a reasonable articulable
15 suspicion, his reasonable articulable suspicion is based on
16 merely his training, knowledge, and experience of working in
17 Baltimore City and the people, especially black males, running
18 along the street holding their waist area must be armed.

19 The cases are really divided up into several -- if
20 it's a high crime area, that's important. There was no
21 testimony this was a high crime area. If there's an informant
22 tip of a person running down the street, that may be
23 important. But there's no informant tip here. If there's
24 observations -- the lateness of the hour, this was not late.
25 This was still daytime, it was 7:00 o'clock April 11th, 2011.

1 Observation by the officer that a crime may be afoot, maybe
2 yes to a fight. He heard gunfire, he has no evidence that
3 Mr. Jones was part of that fight. The next factor is whether
4 there's evasive conduct. There was no evasive conduct.
5 Mr. Jones complied immediately. If there's any furtive
6 movements, there was no furtive movements because Mr. Jones
7 was immediately on the ground. And finally, was there a bulge
8 in the clothing? There was no bulge in the clothing until
9 after the stop, and it's our position there was no proper
10 stop.

11 THE COURT: Thank you, Mr. Bussard. The salient of
12 facts are these: The detective testified that he was on duty
13 on routine patrol. He all the windows down in his car, he was
14 stopped in traffic. He heard an altercation break out. He
15 glanced and saw the scope and size of the altercation. He
16 estimates that there were some six people involved. He heard
17 sounds consistent with fists striking flesh, suggesting that
18 it was a serious event that was taking place beside him. He
19 started to make decisions about how he was going to properly
20 respond to this, taking into account that he was alone and
21 that it would be a better tactic to wait until he had
22 assistance.

23 He continued to move down North Avenue as these
24 events were developing, when he heard gunshots fired. A very
25 significant fact in the story that is told here. After having

1 heard the gunshots fired, and while still maneuvering his
2 vehicle, he saw an individual, later turned out to be the
3 defendant, who was running from the direction from which he
4 had heard the gunshots and from where he had been when he
5 witnessed the altercation with the sounds of fists striking
6 flesh.

7 He then, in reaction to all of that, looked at the
8 individual who was running more closely and noticed that he
9 was carrying his hand in his left dip area, a common method of
10 carrying a firearm on the streets of Baltimore. The detective
11 looped his vehicle around and then came up on the right side
12 of the defendant as the defendant, now on foot, traveled
13 northbound on Homewood. And the detective at that point, with
14 reasonable and articulable suspicion that criminal activity
15 was a foot, confronted the defendant and challenged him. At
16 which point the defendant immediately raised his hands, asked
17 that the detective not shoot him, and immediately then said,
18 "I have a gun."

19 At that point, the defendant -- the officer, if not
20 before, clearly had probable cause to effect an arrest of the
21 defendant and to search the defendant incident to that arrest.
22 And in the course of that search incident, to arrest, which
23 also could have been part and parcel of a *Terry* pat down, but
24 frankly, the situation had ripened into more than that. In
25 the course of all of that, the detective located the firearm

1 that has been described.

2 The encounter between the detective and the
3 defendant was entirely lawful. The interdiction of the
4 defendant on the street was completely compliant with the
5 constitution and relevant law. The subsequent search of the
6 defendant was also lawful. There is a fact out there that is
7 a part of this story, Mr. Bussard, you'll need to help me in
8 this regard. First of all, let me say that any motion to
9 suppress evidence in this case based on the lawfulness of the
10 arrest is denied. But there was also the statement made after
11 the lieutenant made his comment, did you want to argue to the
12 Court now about whether or not that statement should be
13 admissible?

14 MR. BUSSARD: Not at this moment, Your Honor.

15 THE COURT: Do you think the motion is ripe for
16 ruling at this time?

17 MR. BUSSARD: I guess it is, there is no other
18 evidence that's going to come in.

19 THE COURT: All right. So now's the time then, if
20 there's anything else you want to argue on that, otherwise I'm
21 going to rule on the admissibility of that statement.

22 MR. BUSSARD: The detective stated that Miranda was
23 given. And then there was a statement after that Miranda
24 warning was given about the -- about the weapon.

25 THE COURT: Correct.

1 MR. BUSSARD: And the shooting. I don't have an
2 argument on that.

3 THE COURT: Thank you, Mr. Bussard. I find that the
4 statement is admissible on two bases. Number one, I find the
5 detective's statement that Miranda warnings had been given to
6 have been credible. There was not a lot of discussion about
7 whether or not they were knowledgeably and clearly waived. So
8 perhaps that is left hanging a bit, but all of it is rendered
9 moot by the following finding by the Court, and that is that
10 while I do find that the lieutenant, upon arrival at the
11 scene, did make a general inquiry of his officers who were
12 present as to whether or not this -- is this the individual
13 who's the suspect in the shooting, and that certainly was a
14 question, and it was directed at the group.

15 But importantly, it was not, and I so find, directed
16 at the defendant. And therefore, while the defendant was
17 clearly in custody, custodial interrogation of the defendant
18 did not occur because that inquiry was not put to the
19 defendant. It was a reasonable question that was put to the
20 group of officers. I don't find that it was a so-called
21 Christian burial speech or other statement made by an officer
22 not in the form of a question, but nonetheless designed to
23 elicit an incriminating response from the person in custody.
24 I do not make that finding here.

25 It was a logical question to pose. And the

1 defendant then spontaneously offered the statement about the
2 fact that the other guy shot first. The statement, therefore,
3 is not rendered inadmissible by virtue of anything that
4 happened there on the street, to the extent that there is a
5 motion to suppress it on that basis, it is denied.

6 All right. Where are we, Mr. Martinez?

7 MR. MARTINEZ: Your Honor, the next motion to
8 address is paper No. 227. That is Wesley Brown's motion to
9 suppress the fruits of a search warrant on 1716 Latrobe Street
10 on April 26th, 2013. The challenge to the search warrant can
11 be decided based on the paper, but there's also the motion to
12 suppress a statement that Mr. Brown made while the warrant was
13 being executed. And to resolve that motion we have two
14 witnesses to call. Task Force Officer Jonathan Hayden from
15 the ATF and former Baltimore Police Detective Michael Glenn.

16 THE COURT: All right. These are all in paper 227?

17 MR. MARTINEZ: Yes, Your Honor.

18 THE COURT: Mr. Davis, Mr. Trainor, who's got this?

19 MR. DAVIS: I've got it, Your Honor, Mr. Davis.

20 THE COURT: All right. So Mr. Davis, clearly the
21 government would like to get the evidence on first. And I'm
22 somewhat sympathetic to that. I don't want to disturb
23 officers' schedules anymore than necessary, but what's the
24 logical sequence in which these two issues should be decided,
25 to the motion attacking the warrant and then the subsequent

1 evidence?

2 MR. DAVIS: I don't think there's any significance
3 as to which goes first. I think we can take it in any
4 order.

5 THE COURT: Okay. So you want to just get the
6 witness on or --

7 MR. MARTINEZ: Your Honor, I don't think it will
8 take long to get the search warrant out of the way.

9 THE COURT: Let's deal with the search warrant. One
10 minute. Mr. Jaco.

11 This is the Latrobe Street; right? 1716 Latrobe?

12 MR. DAVIS: That is correct.

13 THE COURT: And the alleged buys at the house, in
14 front of the house.

15 MR. DAVIS: In front of the house, I think, and in
16 the alley.

17 THE COURT: And the fence post and that stuff.

18 MR. DAVIS: Yes.

19 THE COURT: I've got it. I remember it. Okay.
20 Let's hear first from Mr. Davis just a brief synopsis of what
21 your complaint is with respect to the execution -- or the
22 obtaining and execution of the search warrant and then we'll
23 go from there.

24 MR. DAVIS: It primarily deals with the reliability
25 of the informants. No controlled buys were utilized in order

1 to gain entry to this home. The informants appear to be
2 registered informants with the city of Baltimore. I don't
3 know if that gets them any greater degree of credibility than
4 anyone else, any other informants, but I think what's lacking
5 is, is there's no basis for the knowledge that the informants
6 are imparting to the officers. And I think that's where the
7 problem lies. There's no testimony that there -- there's no
8 references in the affidavit that they entered the home on
9 different occasions and observed this or observed that. They
10 could have just as likely gotten the information from somebody
11 standing on the street corner and passed it to the Baltimore
12 Police Department. I guess again --

13 THE COURT: So you and I are not under -- you know,
14 we're not under *Aquilar-Spinelli*, I think is what it was when
15 you and I were in law school, all of that has been rolled back
16 and those kinds of precise specific requirements on informants
17 now sort of give way to a more of a totality of the
18 circumstances analysis.

19 MR. DAVIS: They do, but I still think that you
20 can't justify the search based on what you come up with. And
21 I think there's -- in the paperwork itself there's a failure
22 to state a basis of knowledge for the two confidential
23 informants and I note the lack of controlled buys. And I note
24 the lack of stopping anyone leaving the house or leaving the
25 alley or whatever. I note that there's no reference that we

1 saw these drugs here or we saw this -- this money here or
2 these drugs here or a gun here. There's just nothing like
3 that. It's just generalized statements, which after the fact
4 appear to be corroborated. But before the fact, I don't think
5 they laid out their basis and I don't think it was
6 sufficient.

7 THE COURT: Thanks, Mr. Davis.

8 All right. So, Mr. Martinez, what about it, how was
9 this affidavit sufficient to demonstrate probable cause?

10 MR. MARTINEZ: Your Honor, our position is there was
11 ample probable cause in this affidavit, and we have two
12 confidential informants who corroborated one another. But
13 frankly, even taking their information out of the affidavit,
14 you still have the two affiants themselves, observed Mr. Brown
15 engaging in suspected drug transactions on five different
16 occasions. On one of those occasions they saw him leave his
17 residence, take a drug -- suspected drug stash out of a fence
18 post, and on yet another they saw him leave his residence and
19 do hand-to-hand drug transactions.

20 So simply on the basis of those two observations you
21 have probable cause to believe Mr. Brown's engaged in drug
22 activity and you also have a nexus between his drug activity
23 and the residence. So we could put the issue surrounding the
24 confidential informants to the side and just decide that
25 there's probable cause based on the affiant's observations.

1 But surely the affiant's observations also corroborated the
2 confidential informants. And so when you put the whole
3 picture together, our position is this affidavit was showed
4 ample probable cause.

5 THE COURT: I'm ready to rule. I think it's a close
6 question on whether the affiant's observations by themselves
7 gave rise to probable cause to justify this search. The
8 reason I brought up *Aquilar-Spinelli*, though, is because I
9 think the informants in this case kind of put some frosting on
10 the cake and add to the weight and substance that's in this
11 particular affidavit. Mr. Davis is completely correct in
12 terms of the fact that there wasn't a detailed description of
13 why these informants are known to be particularly reliable and
14 trustworthy from prior experience and so forth.

15 But my view is that the case was -- the affidavit
16 was either all the way there or almost all the way there in
17 terms of probable cause just based on what the affiants
18 themselves had observed with respect to the activities that
19 were going on around the front of that house and over to the
20 side in the alley. At some point a court is entitled to
21 accredit the testimony and experience of experienced officers,
22 experienced affiants, in terms of the sort of conduct that
23 they're observing. And that's what I mean when I say that
24 that took at least most of the way to probable cause, then you
25 add to that, you've got informants saying, yeah, we're buying

1 drugs out of there, or certainly from in front of there. I
2 find that there was probable cause.

3 The last piece of it is, yes, but does that get him
4 in the house? Not just that there's probable cause to believe
5 that there's drug trafficking going on in the front stoop or
6 the alley beside that house or near the fence post, yes, it
7 does get him into the house because the individuals associated
8 with the house for whom there's probable cause to believe they
9 were involved in drug dealing were seen so clearly associated
10 with that house, traveling in and out of it, with the scale of
11 the activity that the affiants themselves observed, assisted
12 by the statements made by the informants, there's probable
13 cause to prove that there would be evidence of drug
14 trafficking found inside that house. That motion to suppress
15 is denied.

16 Now, there's another piece of this, and it has to do
17 with what happened inside the house; right?

18 MR. MARTINEZ: Correct, Your Honor. As I understand
19 it, Mr. Brown is moving to suppress a statement that he made
20 while the search warrant was being executed to the effect that
21 he was located in the second floor rear bedroom when entry was
22 made to the house.

23 THE COURT: Is that basically it, Mr. Davis?

24 MR. DAVIS: That's correct.

25 THE COURT: That's the attack. Okay. So who's your

1 witness?

2 MR. MARTINEZ: Task Force Officer Jonathan Hayden of
3 the ATF.

4 THE COURT: Okay. Let's bring him in. Sir, if you
5 would stop in front of the jury box and face our clerk. Right
6 there.

7 THE CLERK: Good afternoon. Please raise your right
8 hand.

9 TFO JONATHAN HAYDEN,
10 called as a witness, being first duly sworn, was examined and
11 testified as follows:

12 THE WITNESS: I do.

13 THE CLERK: Thank you. You can have a seat. Please
14 state and spell your first and last name for the record.

15 THE WITNESS: Jonathan Hayden, J-o-n-a-t-h-a-n
16 H-a-y-d-e-n.

17 THE CLERK: Thank you.

18 THE COURT: Good afternoon. Your witness,
19 Mr. Martinez.

20 DIRECT EXAMINATION

21 BY MR. MARTINEZ:

22 Q Task Force Officer Hayden, good morning.

23 A Good morning.

24 Q Can you tell us with which law enforcement you're
25 employed?

1 A Employed by Baltimore City Police Department, currently
2 assigned to the Bureau of Alcohol, Tobacco, Firearms and
3 Explosives.

4 Q And what's your rank or title?

5 A I'm a detective with the city and a task force officer
6 with the ATF.

7 Q How long have you been with BPD?

8 A Little over 20 years.

9 Q How about ATF?

10 A Little over nine years.

11 Q Over the last six years or so have you participated in an
12 investigation of criminal activity by the Black Guerilla
13 Family's Greenmount Avenue Regime?

14 A Yes, I have.

15 Q And I want to direct your attention to the early morning
16 hours of April 26, 2013. Were you working and on duty at the
17 time?

18 A Yes, I was.

19 Q Did there come a time that morning when you participated
20 in executing a search warrant at 1716 Latrobe Street in
21 Baltimore City?

22 A Yes.

23 Q Who were the affiants on that search warrant?

24 A It was myself and Detective Golimowski.

25 Q And who lived at 1716 Latrobe Street?

1 A At the time it was Wesley Brown and Lacritia Keene.

2 Q Can you recall at approximately what time the search
3 warrant was executed?

4 A About 4:15 in the morning.

5 Q Can you recall who made initial entry into the home?

6 A SWAT platoon made entry.

7 Q Did you eventually enter the house as well?

8 A Yes, I did.

9 Q And after you entered the home, can you recall where the
10 occupants were at the time?

11 A Yes. SWAT had cleared the house and everyone had brought
12 all the individuals to the first room -- first floor room in
13 the house.

14 Q Can you recall the identities of the persons in that
15 first floor front room when you entered?

16 A Yes. It was Wesley Brown, Tavon Thompson, Lacritia
17 Keene, Brittany Carter, and their young daughter.

18 Q And do you see Mr. Wesley Brown in the courtroom today?

19 A Yes. He's sitting to the far left of counsel with his
20 hand on his chin right now.

21 THE COURT: The record will so reflect.

22 Q (BY MR. MARTINEZ) Detective Hayden, can you recall
23 whether any of the people you just identified were in
24 handcuffs as you entered the first floor front room?

25 A I believe Mr. Brown was, Mr. Thompson was, and I believe

1 Ms. Keene was at the time.

2 Q And after you entered the room, Detective, what, if
3 anything, did you do to advise the occupants of their Miranda
4 rights?

5 A I actually had Miranda forms, to which I read the Miranda
6 rights to everybody sitting in the room at one time. And then
7 I asked each one individually if they understood their
8 rights.

9 Q So did you ask Mr. Brown individually whether he
10 understood his rights?

11 A Yes, I did.

12 Q How did he respond?

13 A First he answered nonverbally and I asked him -- I needed
14 a yes or no answer and he said yes.

15 Q Did you also ask the occupants of the room to sign
16 written Miranda waivers?

17 A Yes.

18 Q Did they agree the sign the waivers?

19 A No. Mr. Thompson, Mr. Brown, and Ms. Carter did not sign
20 them, but Ms. Keene did sign hers.

21 Q All right. We'll start by showing you what we've marked
22 here as Government's 3A, recognize this?

23 A Yes.

24 Q What are we looking at here?

25 A It's the advice of rights and waiver, the statements of

1 rights that I read and this was the paper I offered to
2 Mr. Brown to sign.

3 Q How about Government's 3B?

4 A Again, this is another advice of rights and waiver with
5 the statement of rights I read and this was Ms. Keene's, to
6 which she did sign and witnessed by Detective Glenn.

7 Q And 3C?

8 A Again, another advice of rights and waiver. This one was
9 for Ms. Carter, who also refused to sign and stated she just
10 didn't feel like writing.

11 Q Finally, 3D?

12 A That one is another advice of rights. This is one was
13 for Tavon Thompson, who also refused to sign.

14 Q Was any other law enforcement officer present when you
15 read the occupants of the room their Miranda rights and
16 presented them with the written forms we just showed you?

17 A Yes. Detective Michael Glenn was in the front room with
18 me.

19 Q After you read the Miranda warnings and presented those
20 forms you just looked at, did you ask any questions of the
21 occupants of the room?

22 A Once they all advised they understood their rights, I
23 asked them where in the house they were located, to which time
24 they gave me their responses.

25 Q Was that the only question you asked?

1 A Yes.

2 Q And so did Mr. Brown answer your question as to where he
3 was located in the room?

4 A Yes. He had stated he was in the second floor rear
5 bedroom.

6 Q Did you, in fact, already know at the time you asked the
7 question where Mr. Brown had been located?

8 A Yes. Upon actually entering the house, the platoon
9 leader of the SWAT team had advised me where everybody in the
10 house was located, so I was just verifying his information.

11 Q Now, after you had asked that question and obtained a
12 response from Mr. Brown, was the house then searched?

13 A Yes.

14 Q Can you summarize briefly, what, if anything, was
15 recovered?

16 A In the second floor rear bedroom where Mr. Brown was
17 found, 16 blue top vials were located in a men's New Balance
18 shoe, two clear gel caps of heroin were located in another New
19 Balance shoe. There were 50 gel caps of heroin located in a
20 shoebox. There was \$256 located in a purple doll purse.

21 Mr. Brown's ID and a letter addressed to Mr. Brown under the
22 name of Shike White was located. There was various packaging
23 material, several blue top -- empty blue top vials, the book
24 *Soledad Soldier*, along with other BGF paperwork were located
25 in the bedroom closet. There were some empty plastic baggies

1 also located in the bedroom. Throughout the house there was
2 more packaging located in the kitchen and some various
3 paperwork on the ledge going down to the basement.

4 Q After the search was completed and those items were
5 recovered, was Mr. Brown placed under arrest?

6 A Yes, he was.

7 MR. MARTINEZ: Those are the only questions I have,
8 Your Honor.

9 THE COURT: Cross.

10 MR. DAVIS: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. DAVIS:

13 Q Detective Hayden, you entered the home at 4:15 in the
14 morning?

15 A SWAT made entry, yes.

16 Q And do you have that advisement of rights the Miranda
17 form, do you have that in front of you?

18 THE COURT: Put that back on the screen.

19 MR. MARTINEZ: Counsel, which one?

20 MR. DAVIS: 3A.

21 THE COURT: For this individual?

22 MR. DAVIS: Yes, for Mr. Brown.

23 THE COURT: Thank you.

24 MR. DAVIS: If you could slide that down a little
25 bit, Mr. Martinez, so we can see the upper left-hand --

1 Q (BY MR. DAVIS) What time did you read the Miranda
2 warnings?

3 A 4:27.

4 Q And you entered at 4:15, so it was about 7 minutes later;
5 correct?

6 A Well, approximately 4:15, so --

7 THE COURT: That would be 12 minutes, Mr. Davis.

8 THE WITNESS: That would be 12 minutes.

9 Approximately.

10 THE COURT: I assume that's an arithmetic deficiency
11 on your part from your educational background.

12 MR. DAVIS: One of many errors that are going to
13 follow today.

14 Q (BY MR. DAVIS) Now, you indicated that the SWAT team
15 entered the home with your unit; correct?

16 A SWAT team entered on their own.

17 Q All right. And the warrant you obtained was a no-knock
18 warrant?

19 A Correct.

20 Q Again, it was at 4:15 a.m.; correct?

21 A Approximately, yes.

22 Q Did you utilize the provision in the warrant and not
23 knock to enter the home?

24 A Correct, the SWAT team did use that provision.

25 Q Would it be fair to say that you knocked the door down to

1 enter the home?

2 A SWAT, yes, used force to enter.

3 Q Was SWAT armed?

4 A Yes.

5 Q Weapons drawn?

6 A Probably, yes.

7 Q Just thinking back, what type of weapons were they
8 carrying when they entered that home?

9 A I've never been on SWAT, so probably handguns and maybe a
10 few short guns.

11 Q And your unit was armed also; correct?

12 A Well, we were actually standing back towards the -- we
13 actually stayed back about a block, a half a block from when
14 SWAT is making the entry, so as not to come in any crossfire
15 or mess up any operational situations they have.

16 Q Now, you told us when you encountered Mr. Brown he was in
17 the front room; correct?

18 A Correct.

19 Q Was he in cuffs at that time?

20 A Yes.

21 Q Based on your conversations with other officers that
22 entered the home, he had been located in another room --

23 A Correct.

24 Q -- upon entry. So and he was in cuffs when you saw him;
25 correct?

1 A Correct.

2 Q So apparently he had been moved from one room to another
3 by armed officers at 4:15 a.m. in cuffs and placed in another
4 room; correct?

5 A Correct.

6 Q Is it fair to say he was not free to leave?

7 A Correct.

8 Q Now, you also indicated that you read everyone their
9 Miranda rights; correct?

10 A Yes.

11 Q And did you do that as a group?

12 A I read them individual -- I read it as a group to
13 everyone and then I asked each individual if they understood
14 their rights.

15 Q And then you got a response from them; correct?

16 A Correct, one at a time.

17 Q One at a time. So you walked up and looked at each
18 person, read them their rights, asked them if they understood,
19 they said yes, and what did they say about talking to you?

20 A No, I asked them if they understood their rights, they
21 said yes, and that was it. They made no response to not
22 talking to me or talking to me.

23 Q That's when you brought out the Miranda waivers;
24 correct?

25 A Correct.

1 Q That's when you presented individual Miranda waivers to
2 the individuals in the home; correct?

3 A Correct.

4 Q At that point that's when Mr. Brown refused to waive his
5 rights; correct?

6 A No, he just refused to sign the paper. I said this is
7 not a waiver of rights, it's just a would-you-like-to-sign
8 this waiver of rights acknowledging that you understand --
9 basically that said I understand, but I'm not signing
10 anything.

11 Q So it's your -- you're telling us that he didn't -- that
12 he wasn't asserting his rights, he was just asserting -- he
13 was just saying he didn't want to sign any papers?

14 A From my understanding, even Ms. Carter said she just
15 didn't feel like writing.

16 Q I want to narrow you down to Mr. Brown.

17 A Okay.

18 Q You presented him with this form, which read, you have
19 the right to remain silent, anything you say can be used
20 against you, so forth and so forth, and he told you, I don't
21 want to sign this; correct?

22 A He said he understood his rights and he did not want to
23 sign.

24 Q The next thing you did was is you asked him where he was
25 in the house; correct?

1 A I asked everybody, yes.

2 Q But you --

3 A Yes, I asked Mr. Brown where he was.

4 MR. DAVIS: I have no further questions.

5 THE COURT: Any redirect?

6 MR. MARTINEZ: No.

7 THE COURT: Okay. We will take a brief recess. The
8 defendants are remanded to the custody of the Marshal and we
9 will reconvene in 15 minutes. Recess.

10 (A recess was taken.)

11 THE COURT: More proof on this particular motion,
12 Mr. Martinez?

13 MR. MARTINEZ: Yes, Your Honor, just briefly from
14 former Baltimore Police Detective Michael Glenn.

15 THE COURT: Flynn?

16 MR. MARTINEZ: Glenn.

17 THE COURT: Oh, yes, Detective Glenn. Bring him in.
18 Sir, please come forward up here to the jury box, stop there,
19 turn and face our clerk and raise your right hand.

20 THE CLERK: Good afternoon.

21 DETECTIVE MICHAEL D. GLENN,
22 called as a witness, being first duly sworn, was examined and
23 testified as follows:

24 THE WITNESS: I do, ma'am.

25 THE CLERK: Thank you. You may have a seat.

1 THE WITNESS: Thank you, ma'am.

2 THE CLERK: Please state and spell your first and
3 last name for the record.

4 THE WITNESS: Sure. My name is Michael D. Glenn,
5 first name spelled M-i-c-h-a-e-l; last name is spelled
6 G-l-e-n-n, just like the astronaut.

7 THE COURT: Thank you. Your witness,
8 Mr. Martinez.

9 DIRECT EXAMINATION

10 BY MR. MARTINEZ:

11 Q Mr. Glenn, good morning.

12 A Good morning, sir.

13 Q Tell us where you work, sir.

14 A I'm currently employed with the Office of the Attorney
15 General as an investigator.

16 Q What kind of investigations do you do there?

17 A Elder abuse and Medicaid fraud, sir.

18 Q Were you previously employed by the Baltimore Police
19 Department?

20 A I was, sir.

21 Q Were you also previously deputized as a task force
22 officer with the ATF?

23 A I was, sir.

24 Q Can you tell us how long you were with the BPD?

25 A About 27 years, sir.

1 Q How about the ATF, how long with them?

2 A Deputized in 2003, retired in 2016, sir.

3 Q Okay. I want to direct your attention to the early
4 morning hours of April 26, 2013. Were you working and on duty
5 at that time?

6 A Yes, sir.

7 Q And did there come a time that morning where you
8 participated in the execution of a state search warrant at
9 1716 Latrobe Street in Baltimore City?

10 A Yes, sir.

11 Q Can you recall approximately what time the search warrant
12 was executed?

13 A Approximately 4:15 a.m., sir.

14 Q Can you recall who made initial entry into the home?

15 A Baltimore City SWAT made initial entry into the home,
16 sir.

17 Q Did you eventually enter the home?

18 A Yes, sir. I was one of the last ones to enter the
19 house.

20 Q When you entered the house, could you determine where the
21 occupants were?

22 A When I entered into the house, everybody was downstairs
23 in that front room right next to the front door, sir.

24 Q Can you recall who specifically was in that room?

25 A Wesley Brown, Ms. Latrice Keene (sic), Brittany Carter,

1 and Tavon Thompson, sir.

2 Q And do you see Mr. Brown in the courtroom today?

3 A Yes, sir. He's seated over there next to the gentleman
4 with the curly hair.

5 MR. DAVIS: No objection.

6 THE COURT: To either the depiction --

7 THE WITNESS: Sorry, sir.

8 THE COURT: The record will so reflect that the
9 witness has identified the defendant Wesley Brown. You may
10 continue.

11 Q (BY MR. MARTINEZ) Detective Glenn, after you entered
12 that first floor front room, can you recall whether anyone
13 advised the occupants of the room of their Miranda rights?

14 A Yes, sir. Detective John Hayden advised the occupants
15 that were down there of their Miranda rights.

16 Q And can you recall what, if anything, Detective Hayden
17 did to make sure the occupants of the room understood their
18 rights?

19 A Detective Hayden had an ATF form with the advisement of
20 rights on there and he read the advisement of rights out to
21 everyone in the room. And at that point, once he read out all
22 the advisement of rights, he made sure everyone in the room
23 acknowledged that they understood the advisement of rights.

24 Q So did Detective Hayden ask Wesley Brown whether he
25 understood his rights?

1 A Yes, he did, sir.

2 Q Can you recall how Wesley Brown responded?

3 A At first he didn't respond, sir. John said you've got to
4 say yes or no that you understand your rights. He at one
5 point said yes.

6 Q All right. Can you recall whether Detective Hayden also
7 asked the occupants of the home to sign written Miranda
8 waivers?

9 A Yes, sir.

10 Q And I'll just run through these quickly with you. I'll
11 show you what's come in as Government's 3A. What's this?

12 A Yes, sir.

13 Q Do you recognize this?

14 A Yes, sir. This is the advice of rights and waiver form
15 that Detective Hayden had with him as he was going through the
16 rights with the individuals inside the 1716. And on it is the
17 signature where it's -- signature says refused, the printed
18 name is Wesley Brown. The witness signature is mine,
19 Detective Michael D. Glenn, and printed name is Michael
20 Glenn.

21 Q Okay. So it was your understanding that after
22 acknowledging that he understood his rights Mr. Brown was
23 presented with this written form and refused to sign it; is
24 that right?

25 A That's correct.

1 Q 3B, is this a similar form for Lacritia Keene?

2 A Yes, sir. The difference with Ms. Keene is that she
3 actually signed. She agreed to sign the waiver form. Again,
4 my name is here, Detective Michael Glenn, witness printed
5 Michael D. Glenn.

6 Q 3C?

7 A Yes, sir, refused. John -- Detective Hayden printed
8 Brittany Carter and wrote down "I just didn't feel like
9 writing." Again, my signature is there along with my printed
10 name, sir.

11 Q And finally, 3D?

12 A Again, sir, it's the same form that John Hayden used.
13 Mr. Thompson refused. His name is printed, Tavon Thompson.
14 I'm witnessing it, Michael D. Glenn, printed name Michael
15 Glenn, sir.

16 Q All right. Now, after Detective Hayden advised the
17 occupants of the room of their Miranda rights and presented
18 those forms, can you recall whether he asked any questions?

19 A Yes, sir, he did.

20 Q Can you recall how many questions he asked?

21 A Basically one question, sir.

22 Q What question did he ask?

23 A Where were you at inside the dwelling.

24 Q And did each of the occupants in the room respond to that
25 question?

1 A Yes, sir, they did.

2 Q Did Mr. Brown respond to that question?

3 A He did, sir.

4 Q And what, if anything, did he say?

5 A He basically said he was upstairs in the rear bedroom.

6 MR. MARTINEZ: Those are all the questions I have,
7 Your Honor.

8 THE COURT: Mr. Davis.

9 MR. DAVIS: I have no questions.

10 THE COURT: Okay. The witness may step down and be
11 excused. Anymore proof?

12 MR. MARTINEZ: No, Your Honor.

13 THE COURT: Mr. Davis, argument -- you're excused.

14 THE WITNESS: Thank you, Your Honor.

15 MR. DAVIS: Well, Your Honor, the gist of the
16 argument is that this was a coercively elicited statement.
17 The manner of entry; SWAT team, guns, he's handcuffed he's
18 moved around against his will, he was put into a room, he's
19 advised of his rights, he's presented with a form to
20 acknowledge that he understands his rights and waives them,
21 and he refuses to answer that. And the next thing that
22 happens is, is the detective asks him a question about where
23 he was and presumably because they had recovered a substantial
24 amount of drugs in the room that they claim that he was in.
25 And we think that under the circumstances the question was

1 certainly -- shouldn't have been asked. He had already --

2 THE COURT: What's your best argument for the
3 notion, which I think is implicit in what you're saying, but
4 I'm not sure, that he invoked his rights?

5 MR. DAVIS: I think when he refuses to sign the form
6 and he doesn't answer when initially prompted, when the
7 detective initially asked him a question, he didn't even
8 answer. When they asked him if he understood his rights, he
9 had no interest in talking to them and that upon --

10 THE COURT: Is an officer not permitted under our
11 very much evolved Miranda law to prod a person along to a
12 response, not to a substantive question, but just to a
13 response to the question of, do you understand your rights,
14 and you get a flat no response, flat affect picture, is an
15 officer then stepping over the line when they say, hey, come
16 on, you've got to answer yes or no, you understand what's
17 going on here? That's giving the person the option of
18 answering no, I don't understand; or no, I don't; or I won't
19 sign; or no, I don't waive, I don't do anything.

20 MR. DAVIS: I think you have to take a look at the
21 totality of the circumstances. We can't take anything in
22 isolation. Your example was in isolation. When the officer
23 asked him if he understood his rights, he doesn't say
24 anything. That's just one part of the equation. When we look
25 at everything, when we look at the SWAT team entry and no one

1 described what they looked like, but everyone can probably
2 conjure up an image of the SWAT team entering Mr. Brown's
3 house at 4:15 a.m. It was probably pretty intense, probably
4 the best characterization.

5 And then you look at the fact that the doors are
6 knocked down when they go into the house, and you look at the
7 fact that he's roused out of bed, handcuffed, dragged into
8 a -- taken into another room, everybody's herded into a room,
9 and then they ask him if he understands his rights. He's not
10 talking to them. All right. Well, they push it again. He
11 says yes, I understand. All right. They've got him to say he
12 understands his rights. Next step, let's have him waive those
13 rights in writing. He understands his rights, he gets the
14 waiver with those rights, and he refuses to sign it.

15 There's no indication that he doesn't feel like
16 writing. If anything, clearly the circumstances are is he
17 does not want to talk to them. And the next thing that
18 happens is the officer pushes on. And he asks him where were
19 you, and the obvious reason for asking where the individuals
20 were is because there are items secreted in different rooms,
21 in particular, in the room he was in. And I just think under
22 the totality of the circumstances the statement was coerced.
23 I don't see how it can be characterized in a different way
24 under these circumstances.

25 THE COURT: Thank you, Mr. Davis. The Court's

1 finding is that the officer's efforts to Mirandize the
2 defendant and secure an indication that he understood the
3 warnings and then to find out whether or not he waived them
4 and wished to speak was greeted with what the officers
5 appropriately interpreted as ambivalence. There were no flat
6 denials or refusals, there was just a nonresponse. And the
7 question is, well, what are the officers to do in the face of
8 that?

9 My finding is that the next step that they took was
10 a reasonable one, which was to prod the defendant further:
11 Well, hey, man, what is it, yes or no, you understand or you
12 don't understand? And he responded to that affirmatively that
13 he did. Then there's the question of whether he's going to
14 understand and then sign the waiver form, and he indicated
15 that he didn't want to sign it. Does that mean that he is
16 not, that he's expressly not waiving his rights? Nothing of
17 that nature actually occurred, it's just more this very
18 ambivalent picture that has presented itself. The law is that
19 the defendant has to affirmatively invoke in order for that to
20 be effective.

21 So there is no Miranda violation here. I want to be
22 careful to distinguish this circumstance from one that came
23 before the Court relatively recently in the extensive ECI
24 prison litigation I'm doing where I did find a Miranda
25 violation and suppressed evidence. And in that circumstance

1 the officer could not remember whether or not the defendant
2 had waived her rights and had indicated that she understood
3 and was willing to speak. And there has to be some
4 affirmative indication.

5 In this case we have a slightly different situation,
6 which is that there's been this whole advisement given of the
7 defendant. He hasn't indicated that he does not want to
8 speak, he hasn't declined to waive, he hasn't said no, he
9 hasn't invoked, as we say in this sort of parlance of this
10 business, and then a question gets asked, which he supplies an
11 answer to, which maybe apparently is an inculpatory answer,
12 but we'll have to see at trial what the significance of this
13 is. But the totality of those circumstances persuade the
14 Court that informally, fully understanding what his rights
15 were and what he was entitled to do or not do in the
16 circumstances, he chose to go ahead and answer the question.
17 And effectively he waived when he did that.

18 Actually, here, Mr. Davis, though, going down a
19 slightly different road, so let's dispose of the Miranda issue
20 quickly by saying to the extent the motion is based on that,
21 it's denied, and turn to where I hear Mr. Davis going more
22 broadly, which is just a general complaint that what went on
23 here is just inherently coercive and that it effectively
24 violates the defendant's 5th Amendment rights big picture,
25 that there was an involuntariness to everything that occurred.

1 And I've thought about that. And certainly the way
2 that the SWAT teams in Baltimore enter houses, I don't know if
3 they used any flash bangs on this one, but they batter doors
4 down. It's certainly not a sort of a calm, neutral method of
5 entering the residence. It's very dramatic. It's designed to
6 be, to protect the officers' safety through stunning the
7 occupants inside, quickly gaining the upper hand so that law
8 enforcement is not endangered as they're executing a warrant,
9 which is their job to do, number one; and number two, they're
10 entitled to be safe.

11 So no criticism whatsoever to how the warrant was
12 executed, just an appreciation, though, for the true facts and
13 circumstances that attend to these very dramatic entries.
14 It's given the Court some pause. I think that Mr. Davis's
15 broad argument about the sort of shock that is delivered in
16 one of these scenarios is real and something to be reckoned
17 with.

18 I note that the time of entry is about 4:15, that it
19 was 12 minutes later that the waiver forms were being
20 presented to the various individuals, including Defendant
21 Brown. That is not a tremendous time, but it is in my
22 judgement enough time for the sort of shock reaction that I've
23 been referring to, to have sufficiently dissipated so that a
24 person would be expected to be able to have recovered their
25 senses and their judgment and their ability to look out for

1 themselves in terms of their rights.

2 I also give significance to the fact that the
3 evidence is that all of the individuals in the house had been
4 gathered in one room. Yes, they were in handcuffs, but the
5 mood and circumstances had changed dramatically. This is not
6 a situation where we've got evidence indicating that a
7 defendant has been laid out on the floor, has an officer's
8 knee in his back, a gun to his head, any of those kinds of
9 extreme circumstances. But instead, he's in handcuffs and
10 sitting quietly in the front room of the house when this
11 interchange occurs.

12 The picture that's painted by the evidence that I've
13 heard is a situation where the original shock and the sort of
14 circumstances that would overwhelm the will of any person had
15 largely dissipated and the overall climate in the room had
16 transitioned back to a noncoercive context or environment, at
17 least within the context of what the constitution is concerned
18 with. Accordingly, the motion to suppress the statement is
19 denied.

20 All right. Where are we?

21 MR. MARTINEZ: The next motion to address, Your
22 Honor, is also by Mr. Brown and that is the motion to the
23 suppress the fruits of the May 2013 tracking warrant and
24 subsequent search of his cell phone.

25 THE COURT: Let me back up to a moment ago. I think

1 for purposes of the record, and to have some sympathy for the
2 law clerks at the Court of Appeals, what motion was that ruled
3 on by number, Mr. Davis?

4 MR. MARTINEZ: The one we just ruled on, I believe,
5 was 227.

6 MR. DAVIS: Yes.

7 THE COURT: 227, it had two components and I've now
8 ruled on both of those components.

9 MR. DAVIS: That's correct, Your Honor.

10 THE COURT: Thanks for that clarification, counsel.
11 Now, back to where you started. What were you telling me,
12 Mr. Martinez?

13 MR. MARTINEZ: I was telling you we're on paper 221.
14 That is the motion to suppress the fruits of the May 2013
15 tracking warrant with respect to Mr. Brown's cell phone.

16 THE COURT: Right. Just bear with me a second.

17 MR. DAVIS: Certainly, and Your Honor, may I correct
18 something in that motion? Under the ill- -- on page 2, the
19 illegal search and seizure of the cell phones, it should be
20 cell phone singular.

21 THE COURT: Yes.

22 MR. DAVIS: And we should scratch out that Brown had
23 a flip cell phone. That doesn't apply. It's just one cell
24 phone.

25 THE COURT: All right. I've got to get back up to

1 speed on this for just a second here.

2 This is where we start into Stingray; right,
3 Mr. Martinez?

4 MR. MARTINEZ: That's correct.

5 MR. DAVIS: This particular motion, Your Honor.

6 THE COURT: Yes.

7 MR. DAVIS: Overlaps with Mr. --

8 THE COURT: With 212 and 243, I'm sorry, go ahead.

9 MR. DAVIS: 221 should be argued along with 247,
10 which is the cell site simulator motion that we adopted, that
11 Mr. McCants's attorney filed. Again, looking at that, there's
12 an error in the facts here too on 243. It's one cell phone,
13 there was no search of 1716 Latrobe in relation to this, nor
14 was there cell phone recovered from Latrobe. It's only one
15 cell phone that was recovered when he was stopped. What
16 happened was, is they obtained a --

17 THE COURT: There was one phone taken from him.

18 MR. DAVIS: His person. It's a white iPhone.

19 THE COURT: Uh-huh.

20 MR. DAVIS: And the reason this overlaps with
21 Mr. McCant's cell site simulator motion is, after we filed
22 this we were informed that a cell site simulator was utilized
23 to --

24 THE COURT: I'm wondering if we can't break this
25 down into manageable chunks here. First of all, do we have

1 any big factual disputes about what happened in relation to
2 this motion?

3 MR. DAVIS: Probably not, this is really legal, I
4 believe.

5 THE COURT: Don't you think, Mr. Martinez?

6 MR. MARTINEZ: I think that's fair to say, Your
7 Honor.

8 THE COURT: You have witnesses ready to go on it?

9 MR. MARTINEZ: We do indeed.

10 THE COURT: So make a proffer and let's see if
11 Mr. Davis and Mr. Francomano -- is anybody else implicated in
12 this? Let's see if Mr. Davis and Mr. Francomano are able to
13 agree to your proffer as to the facts before --

14 MR. FRANCOMANO: Your Honor, I believe we're in a
15 different situation. Ours is a warrantless search.

16 MR. DAVIS: That's correct.

17 MR. FRANCOMANO: So we're going to have to have
18 testimony, Your Honor.

19 MR. DAVIS: The United States is arguing that the
20 use of the cell site -- well, there was a warrant obtained to
21 gather GPS data from cell site -- from telecommunications --

22 THE COURT: Was there a warrant or was there --

23 MR. DAVIS: An order.

24 THE COURT: An order, which the government wants to
25 have treated as a warrant, because they contend that it was

1 supported by probable cause. And so we don't really have to
2 face the question of whether a warrant was required here or
3 not, because functionally that's exactly what happened. There
4 was an affidavit presented under oath to a judge, who then
5 authorized the action that was taken, however you characterize
6 it.

7 MR. DAVIS: That is the United States' argument.
8 But we have -- we are factually different than Mr. McCants's
9 motion. But we still believe that the use of the cell site
10 simulator was not authorized. There's also another device
11 utilized in addition to the cell site simulator. There was a
12 radio frequency detector. I know it sounds like Inspector
13 Gadget, it really became Inspector Gadget as it went along.
14 What happened was, is the officers obtained the order to get
15 the cell -- to get the telecommunication providers to assist
16 them.

17 THE COURT: Yes, they start pinging the phone.

18 MR. DAVIS: Pinging the phones and so forth. They
19 threw a sentence in there saying that they could put -- or
20 utilize other devices to locate the phone.

21 THE COURT: I didn't miss that.

22 MR. DAVIS: But we don't -- and then after they got
23 that, they pinged -- actually, we might need testimony on
24 this, because we may need to know how many times they pinged
25 from the cell -- from the telecommunication providers, how

1 many times they pinged from their little device that they were
2 carrying around. It might be helpful to hear that, because it
3 may impact on that limited issue alone, unless Mr. Martinez
4 can proffer on that.

5 MR. MARTINEZ: Well, let me back even further up
6 first, Your Honor. As a threshold issue, I agree with
7 Mr. Francomano that Mr. Brown and Mr. McCants, with respect to
8 cell site simulators issues, are on --

9 THE COURT: On different grounds.

10 MR. MARTINEZ: Vastly different situations. Due to
11 the fact that Mr. McCants, in his case, the cell site
12 simulator was used without a warrant based on the exigent
13 circumstances.

14 THE COURT: Right.

15 MR. MARTINEZ: So we're going to need to take
16 testimony as to that motion. I also believe as to Mr. Brown,
17 I think it still would be helpful to take testimony if for no
18 other reason as to establish that the application submitted to
19 Judge Glynn was sworn to and signed. The exhibit that is
20 attached to our motion paper in candor with the Court is an
21 unsigned copy, so we need to put the detective on to at least
22 have him testify, yes, I went to the judge's chambers, I
23 signed this, and this is what I did to find the signed copy.

24 THE COURT: Unless Mr. Davis wants to stipulate to
25 that, which he's not required to.

1 MR. DAVIS: I have no problem stipulating to that.
2 I'm more interested in the pings.

3 THE COURT: I think he is. All right. So we now
4 have a stipulated fact in the record of this case that the
5 warrant was in fact presented to Judge Glynn in the ordinary
6 course of business over there, that is to say that a properly
7 submitted affidavit was presented. And by proper, I mean that
8 it was signed and sworn to by the affiant in Judge Glynn's
9 presence. Does the government agree to that, is that your
10 stipulation?

11 MR. DAVIS: It is, Your Honor.

12 THE COURT: So Mr. Davis, you agree to it, and I
13 want to know that the government agrees to it.

14 MR. MARTINEZ: We do.

15 MR. DAVIS: If those are the facts, we agree.

16 THE COURT: So that's stipulated. Now, where is
17 that going to take us, Mr. Martinez, what do we need next?

18 MR. MARTINEZ: So then we get to Mr. Davis's -- the
19 issue he just raised about how often the phone was pinged and
20 how often BPD was in contact with the cell phone service
21 provider, et cetera. We turned over as part of discovery, we
22 went to --

23 THE COURT: Well, Judge Glynn authorized pingging of
24 the phone.

25 MR. MARTINEZ: Correct.

1 THE COURT: In the order, explicitly, maybe not by
2 using the word "ping," but there's language in there I recall
3 reading that indicated that you can try to detect the phone.

4 MR. MARTINEZ: Correct. And I'm just trying to get
5 to our explanation as to why. I don't think it's of any legal
6 significance how often Baltimore Police Department was pinging
7 the phone or in contact --

8 THE COURT: Actually, having the service provider
9 ping the phone and tell them the results they got.

10 MR. MARTINEZ: Correct, and I think I can proffer to
11 the Court that the witness would testify --

12 THE COURT: Hold on. Mr. Davis, this is Inspector
13 Gadget stuff. You don't think that it was the phone company
14 that was pinging the phone?

15 MR. DAVIS: No, what they did is they used the phone
16 company to narrow the phone down to the 2200 block of Barclay.
17 And then they started using their own device to narrow it down
18 so that they could get within six feet of the person. And
19 then they stopped a group of males on the street. And they
20 whipped out another device, a radio frequency detector, where
21 they located -- which I believe the testimony will be, leaves
22 a digital fingerprint, the cell phone. And I believe they
23 will testify that that led to a phone that was not in public
24 view and secreted in Mr. Brown's pocket.

25 THE COURT: This is not Mr. Francomano's motion, so

1 what I'm interested in hearing from you, Mr. Davis, is where
2 there had been an order worded as it was by Judge Glynn,
3 what's wrong with what they did?

4 MR. DAVIS: I don't think the order authorized --
5 that's a good question. The problem I see here is, is they go
6 to the judge, they get an order, that order authorizes them to
7 go to telecommunications providers and have them assist them
8 in gathering data on this particular phone. That's fine.

9 THE COURT: But there's another little clause in
10 there.

11 MR. DAVIS: There's a clause, and it's very similar
12 to the statement about probable cause. It's just dropped in
13 there. It's obvious that someone decided, hey, we better
14 start including this in there.

15 THE COURT: That's what happens when clever lawyers
16 like you file motions and there's motions hearings and judges
17 rule on them. Law enforcement is listening and they actually
18 change their tactics and reactions to that. That's why I'm
19 saying, I didn't miss the language in there, I didn't see that
20 before, it's like, huh.

21 MR. DAVIS: First, let's look at the last --

22 THE COURT: Read that into the record.

23 MR. DAVIS: Government's Exhibit 13. I look at the
24 last paragraph on page 7: "Ordered that," then it lists all
25 the telecommunications providers, "provide the agency with all

1 call data and cell site data simultaneous with all
2 communications." That's authorizing them to get the
3 telecommunications providers to give them that information.
4 That's not authorizing them to run out and use gadgets that
5 are unregulated that we have no idea how reliable they are,
6 whether they're maintained properly, whether any records are
7 kept, which is why I wanted to know how many times they were
8 pinging, because there's no records of any of this. It's all
9 left to the unfettered discretion of law enforcement.

10 THE COURT: So you're walking down a public street,
11 Mr. Davis, okay, and of course this would never happen with
12 you in a million years, but you have a little baggy of
13 cannabis in your pocket, okay. And here comes the other way,
14 not Inspector Gadget but Inspector K-9 with his dog. And the
15 dog comes walking along and Mr. Davis is walking the other way
16 and all the sudden the dog sits down or whatever, they --
17 they're not like Rin Tin Tin, they don't attack people, they
18 just sit. And immediately they have detected, with a device,
19 in the form of a dog, that you in this public place have got
20 something that they're interested in. They would be entitled
21 to take some steps in relation to that, wouldn't they?

22 MR. DAVIS: Well, I live in the district, so no,
23 they wouldn't, we can possess 2 ounces of marijuana legally.

24 THE COURT: It's still illegal in the district, just
25 under Title 21 of the United States Code.

1 MR. DAVIS: Well, there's a dispute on that between
2 federal pretrial and superior court pretrial, but by and
3 large, you walk down any street and you get the message.

4 THE COURT: The dog would be very busy.

5 MR. DAVIS: Yes. I liken it more to the thermal
6 imaging case, that's what I liken it more to. If you put a
7 dog on someone --

8 THE COURT: Thermal imaging, though, that's in
9 private premises.

10 MR. DAVIS: The Fourth Amendment protects persons
11 and their places. I mean, this is his --

12 THE COURT: What about pot in your pocket that a dog
13 can smell?

14 MR. DAVIS: When they put dogs on people, they
15 generally have a reason to do it. There's generally
16 something, it's kind of similar to a *Terry* stop, there's some
17 indication that crime's afoot. That's not what's going on
18 here. What's going on here is, is they looked inside his
19 pockets. If they didn't have that device, this is akin to
20 walking up and emptying his pockets out and saying, a-ha, a
21 cell phone is in there.

22 THE COURT: No, because when you put something in
23 your pocket, like a pocket knife or something else, it's --
24 all it has is sort of a visual signature to it, and you've
25 successfully hidden that by taking an action to keep it

1 private; you put it in the pocket, you can't see it. But
2 marijuana emits an odor, and even though it's in your pocket,
3 the odor's not in your pocket. The odor has left your pocket
4 and it's gone out into the air within, you know, the range
5 that the dog can detect it. You put an electronic device in
6 your pocket, if you don't turn it off, it keeps sending a
7 little indicator out into the public place that it's there,
8 and somebody walks by without reaching into your pocket and
9 detects it with a little Inspector Gadget thing.

10 MR. DAVIS: How do we get around the mass -- first
11 of all, they wouldn't be approaching him if they hadn't used
12 their Stingray gadget, which was not authorized by the order
13 that was issued by the county judge. That use of that device
14 was not --

15 THE COURT: Not that particular device, but a lot of
16 other equipment also wasn't authorized in terms of the "use
17 the cell towers, use this, use that." I don't think what the
18 device is, is what helps us decide the issue. The question
19 is, what sort of intrusion occurred?

20 MR. DAVIS: I think we have to look at what has been
21 approved because there has to be some order to this. We can't
22 just do these things without structure. There has to be a
23 record of what's used. There has to be an approval for
24 someone to use it. They had approval from the
25 telecommunications company to track him down, but they didn't

1 stop there. They didn't stop there. Then they went to their
2 own devices independent of the order.

3 I mean, how can you say their use of the Stingray
4 was legal and their subsequent use of the radio frequency
5 detector, if you take the order completely out of the picture,
6 you can't say -- there's something wrong with that. They
7 shouldn't be able to do that. You shouldn't be able to track
8 people around. That's not something I expect carrying my cell
9 phone, that law enforcement is going to track me down using a
10 Stingray, and walk up to me as I'm walking down the hall and
11 stop me and take my phone from me because they detected the
12 digital fingerprint of the radio frequency waves coming out of
13 my cell phone.

14 THE COURT: But you can make a decision whether or
15 not you want to walk down the street with very smelly
16 marijuana in your pocket or not. And you can make a decision
17 about whether you want to turn on your device or turn it off
18 as you walk down the street. All you've got to do is turn it
19 off and none of this would work.

20 MR. DAVIS: How do we get around the fact -- again,
21 with the dogs, that's a fair example, but I think it's
22 comparing the dogs to this digital technology. We're one step
23 away from identifying people before they commit crimes and
24 locking them up when we go this far. There has to be a point
25 where you add structure to what's going on, and structure is

1 approval, which is lacking here, for what they utilized.

2 They used what they were approved for and they took
3 it another -- a few steps later. We don't know how often they
4 were pinging with the Stingray. We don't know if they started
5 before they went to the phone company. We don't know how many
6 other people they stopped that may not have been in possession
7 of that. We just don't know what's going on because there's
8 no records of this. There's no need for records because
9 they're just doing what they want, they don't need approval.

10 THE COURT: Well, they've got a broad approval from
11 the Court to go and find out what telephone numbers are being
12 dialed from this phone and what numbers are calling into this
13 phone.

14 MR. DAVIS: That's all documented by the
15 telecommun- --

16 THE COURT: They have that authority. It's not
17 authority to get the content, but it is authority to detect
18 and know they have the right, the legal right --

19 MR. DAVIS: I agree.

20 THE COURT: -- to get those phone numbers and find
21 out who that person is communicating with.

22 MR. DAVIS: I agree with that.

23 THE COURT: Your point is, it's not that aspect of
24 it, it's that they turned a trap and trace into a locational
25 beeper.

1 MR. DAVIS: They took it beyond the technology that
2 exists within the telecommunication providers and they
3 introduced their own unmonitored technical devices, which do
4 not record anything, there's no record of anything they do.
5 There's no buffer zone to say, hey, we can't do that for you,
6 this isn't right.

7 THE COURT: So District of Columbia lawyers all know
8 about *United States versus Jones*.

9 MR. DAVIS: Yes, I represented Mr. Maynard.

10 THE COURT: Okay.

11 MR. DAVIS: I got his plea before he got
12 convicted.

13 THE COURT: Even more, you, Mr. Davis, in
14 particular. Justice Scalia, the late Justice Scalia, told us
15 that really where we're supposed to be going with this whole
16 analysis is back to *Olmstead*, which I was taught back in the
17 Dark Ages was bad law that didn't apply to anything, and that
18 was in 1979. But that's where we are, we're back to basic
19 principles about trespass, which is why I'm sort of now more
20 focused on the question of, well, did they go into his
21 pockets? You can't slap a beeper on the bumper of somebody's
22 private car on a church parking lot; right?

23 MR. DAVIS: That's true.

24 THE COURT: Okay. Without a warrant.

25 MR. DAVIS: Without approval.

1 THE COURT: Okay. But why can't you do that? Not
2 because it has a search quality to it, but because you have a
3 right of privacy in your personal effects that when the
4 government does that's a trespass. So now I'm looking for
5 trespasses a la *Olmstead*. And where's the trespass here? The
6 problem is that the phone is sending the signal out into
7 public space. They didn't go into his pockets, they didn't
8 sneak under his car, they didn't attach something to his
9 bumper. They walked up to him on a sidewalk with NSA
10 gadgetry, I don't know what it is, but they can tell what he's
11 got because of a signal he's emitting.

12 MR. DAVIS: Correct, but they didn't even get that
13 close until they used their other device, which had not been
14 authorized by any judicial official.

15 THE COURT: You want the Court to find that he's got
16 a constitutional right to be sort of hidden in plain sight,
17 that he's got a right to be in what we would otherwise
18 completely recognize as a public space and not be detected
19 there by the means of government tools and apparatus. What
20 about somebody walking around in Baltimore and they get this
21 airplane up there flying around and it's got this super duper
22 lens and it can look down and say, oh, there's Mr. Davis
23 walking down North Avenue? You want a distinction drawn --

24 MR. DAVIS: But I'm on North Avenue in public.

25 THE COURT: Yes, and your client was on a public

1 street too, with this device, but nobody knew it until some
2 special technology like an airplane with a really big lens or
3 this radio frequency detecting device was used to find him
4 within the 600,000 people of Baltimore. That's what you want.
5 You want the Court to draw a line and say sort of like where
6 Chief Justice Roberts started to go with the cell phone
7 opinion several years ago, that, you know, we've got to
8 re-evaluate this whole discussion in light of what the
9 technology is capable of.

10 MR. DAVIS: Well, why do we need legal approval to
11 have the telecommunications providers provide this
12 information, which is all orderly, structured, and recorded,
13 and yet law enforcement doesn't need it at all? Why would we
14 need to have any approval to get it from the
15 telecommunications providers if law enforcement can just do it
16 any way they want, however they want, with no record?

17 THE COURT: I can't answer that. All I can do is go
18 to the law. What do I do with the circuit, my circuit, having
19 said en banc what it has said about historical cell site
20 information in terms of your location?

21 MR. DAVIS: I think that's still being kicked
22 around, I believe.

23 THE COURT: Kicked around, if that's how you
24 describe what goes on at the Supreme Court, that's fine with
25 me.

1 MR. DAVIS: That's kind of an offhand way of saying
2 that.

3 THE COURT: But that doesn't change the law in this
4 circuit.

5 MR. DAVIS: No, but we have to make our arguments.

6 THE COURT: You can preserve the argument, you've
7 already done that. You filed the motion and you're going to
8 get a ruling here, but you've got to persuade me you've got
9 authority.

10 MR. DAVIS: Well, there has to be legal authority
11 to -- first of all, he has a right to be secure in his person.
12 I mean, that's basic. I understand that people -- that
13 technology is evolving, but there comes a point where you have
14 to -- when you walk outside you don't believe that everybody
15 sees what you have. It's not a -- you have a reasonable
16 expectation of privacy.

17 THE COURT: What about CCTV? We've already got that
18 in this city, the blue light cameras, they're watching you all
19 the time. You're on camera right now.

20 MR. DAVIS: Yeah, but I'm not -- I know that,
21 everybody --

22 THE COURT: When you walk down North Avenue, you
23 better know it too because that camera is on.

24 MR. DAVIS: I've seen a lot of things on those
25 cameras lately, people should have known --

1 THE COURT: Clearly, you've seen better than I have,
2 that's part of the problem, but the law is pretty clear.

3 MR. DAVIS: Just I have problems with it because I
4 think it's unfettered, it's unrecorded, there's no structure
5 to it, there's no approval, and it's literally put in the
6 hands of law enforcement. And it's -- you know, there has to
7 be checks and balances here. I don't think we would have a
8 requirement that the telecommunications providers have to
9 adhere to the law and go through a structured process and keep
10 track of everything so that it can be reviewed later on, I
11 don't think we'd have that requirement unless the same
12 requirement should apply to a group of individuals such as law
13 enforcement. I mean, it -- law enforcement is going to them
14 to obtain it from them. Why can they just go out and do it on
15 their own? I think the logical extension of all this is
16 nobody goes to their phone companies anymore, they just whip
17 out their devices and do whatever they want. There's no
18 record to review, there's no anything

19 THE COURT: Articulate for me the Fourth Amendment
20 right that a person has to have their location in a public
21 place not be detected by the use of a device that is merely
22 measuring what is going on in public space or a public place.
23 No hands have gone into any pockets, nobody has taken a
24 telescope and peeked through a window, nobody has taken a
25 spike mike and jammed it into the wall so they can listen to

1 what's going on in the next room. I think -- was that *United*
2 *States versus Katz*? I mean, all of this privacy stuff that
3 we're talking about.

4 MR. DAVIS: But why do you have to go to the Court
5 to get the telecommunications providers to do it if law
6 enforcement can just do it with whatever they want?

7 THE COURT: Well, the practical answer is because
8 right now the telecommunications providers are not going to
9 supply that information without a court order. Their civil
10 lawyers have told them that, so they won't do it, so they have
11 to do that.

12 MR. DAVIS: Checks and balances.

13 THE COURT: The problem that really I think is
14 presented squarely by this case is really not even about
15 telephone numbers. It's certainly not about content of
16 communications. It's this locational issue. It's about
17 whether or not you have a privacy right in where you are in a
18 public place at a given moment. That's the problem.

19 MR. DAVIS: That is part of the problem. But the
20 other part of the problem is, how do they find you in that
21 public space, how do they find you? And what happens if their
22 devices aren't that accurate? And what happens if they stop a
23 group of men and search everybody, and whoops, this machine
24 must not be working right, whatever they're using, none of
25 this is monitored, just push it away. There's no record of

1 this, the guys complain there's no record of it.

2 THE COURT: Broader policy issue and people file
3 lawsuits over things like that. What matters in a criminal
4 case is whether or not some individual with standing had his
5 constitutional rights violated.

6 MR. DAVIS: Well, I'm losing, but I think --

7 THE COURT: You're doing pretty well, because I
8 think it is a profound question. But I don't find a lot of
9 guidance from the appellate courts about this issue of privacy
10 in public. And I'm prepared to find that when you're walking
11 down North Avenue and you're out of your house, you're not in
12 your car anymore, you're walking in public, you still have a
13 zone of privacy. It's a very tight one, it's very confined.
14 It's your pockets, what's inside your jacket, that sort of
15 thing. But the problem is that if you're carrying a little
16 bag of pot, or a little device that's emitting signals,
17 they're going outside of your pockets. They're going out into
18 a place where that officer is absolutely entitled to be, and
19 to stand, and to have his dog there sniffing, and to have his
20 little Get Smart thing turned on to see if there's radiation
21 coming out.

22 MR. DAVIS: But is that reasonable? I mean, do most
23 people reasonably believe that they're going to be emitting a
24 digital footprint and they're going to be located at will by
25 law enforcement at their own discretion? I don't think so.

1 It's a reasonable expectation of privacy that there will be,
2 if you are located in that manner, that it goes through a
3 structured and organized process, that there's records created
4 of it and that someone has reviewed it determined it was
5 appropriate and it was not done here.

6 THE COURT: Whether all that procedure -- that's all
7 secondary. That's all required if we answer the first
8 question in the affirmative. The only important question
9 here, which is whether or not you have a reasonable
10 expectation of privacy, such that little signals that your
11 devices that you've turned on are emitting, get detected.
12 Just like you -- do you have a reasonable expectation of
13 privacy in not having a dog walk down the sidewalk beside you
14 and sniff the fact that you had marijuana in the little baggy
15 in your pocket?

16 MR. DAVIS: In this particular situation we have a
17 group of men that are stopped. How do we justify stopping the
18 whole group? And secondly, Mr. Brown is taken away
19 afterwards. If you look at the application that was
20 submitted, they didn't even use that device to stop him, they
21 used it to get to the 2200 block of Barclay, then they used
22 the other two devices to single him out. But how do you
23 justify stopping all the other men? Don't they have a
24 reasonable expectation of privacy not to be stopped by law
25 enforcement?

1 THE COURT: I don't know. They're not in here.
2 They don't have standing.

3 MR. DAVIS: Actually one of them is.

4 THE COURT: Well, you're not his lawyer.

5 MR. DAVIS: No, but it's just -- I --

6 THE COURT: That -- listen, the Courts are in a
7 complicated spot here, but I've got to apply basic Fourth
8 Amendment principles here, like standing. Let me hear from
9 the government.

10 MR. DAVIS: Certainly.

11 MR. MARTINEZ: Your Honor, just a few factual issues
12 to clear up. First, Mr. Davis suggested that the cell site
13 simulator, and the device used here was a Hailstorm, which is
14 just a different brand name of the Stingray, he suggested that
15 the Hailstorm is a different device than the radio frequency
16 detector. In fact, the radio frequency detector is simply an
17 accessory to the cell site simulator. The simulator gives you
18 radio signal strength information. It gives you a reading
19 that tells you how strong the signal of a particular device is
20 based on where you're standing.

21 THE COURT: Do you accept that as a stipulated fact,
22 Mr. Davis?

23 MR. DAVIS: I do. I just read the reports and it
24 indicated that a radio frequency indicator was used.

25 THE COURT: But this is fine with you and we don't

1 need evidence on this question?

2 MR. DAVIS: No.

3 THE COURT: You agree to that. Go ahead.

4 MR. MARTINEZ: The second factual issue I wanted to
5 raise, and I appreciate where the Court is with respect to the
6 threshold question: Was there a search? But just to clear up
7 the factual record with respect to the order that Judge Glynn
8 issued and what he authorized, Mr. Davis pointed to language
9 that was clearly geared towards communications carriers as if
10 to suggest to the Court that was the sum total of what was
11 authorized here.

12 In fact, as we noted in our paper, and Your Honor I
13 think was alluding to language, and I think you were alluding
14 to the language I'm about to read, which is that Judge Glynn
15 ordered that the agencies were authorized to employ
16 surreptitious or duplication of facilities and then later,
17 "and shall initiate a signal to determine the location of the
18 subject's mobile device." That, we submit is an accurate
19 description of what cell site simulator does. That is in no
20 uncertain terms authorizing the Baltimore Police Department to
21 use a cell site simulator.

22 I'm sure you could say, yes, it doesn't say "cell
23 site simulator," but then on the other hand, Your Honor,
24 neither -- when we apply for a federal wiretap, I don't think
25 our affidavits and applications say "wiretap." They say we

1 are asking to intercept wire and electronic communications and
2 that's what the Court authorizes. So the fact that there's no
3 reference expressly to a cell site simulator is really of no
4 moment here. I just wanted to clarify the record in terms of
5 what was approved. Mr. Davis is saying there was no judicial
6 approval of this device, and in fact there was.

7 THE COURT: I just need to hear argument on one last
8 thing from Mr. Davis, then I'll be ready to rule. And that
9 is, what about the submission to Judge Glynn and whether or
10 not it amounted to probable cause to believe that this process
11 would uncover relevant evidence?

12 MR. DAVIS: Well, it didn't establish probable cause
13 to arrest this man, because he was released that day. And
14 actually, the United States is not using any statements he
15 made after his arrest.

16 THE COURT: No, but to find the --

17 MR. DAVIS: He wasn't arrested, he --

18 THE COURT: It was to find a phone; right?

19 MR. DAVIS: Yes.

20 THE COURT: Okay. Was there probable cause to
21 believe that the finding of that phone would lead to
22 admissible evidence, which is the bedrock question for, you
23 know, a search, a probable cause determination for a search?

24 MR. DAVIS: I would say it fell short.

25 THE COURT: That's what I want to hear about.

1 MR. DAVIS: Well, I would just say it fell short of
2 establishing that.

3 THE COURT: And you stand on whatever record is
4 there, but you want to preserve --

5 MR. DAVIS: The phone was used sometime beforehand.
6 You can't arrest a phone for a murder.

7 THE COURT: No.

8 MR. DAVIS: You can arrest someone that's in
9 possession of the phone in question.

10 THE COURT: But if you're going to go search a thing
11 or search a place for a thing, you have to show by probable
12 cause a connection between that place or that thing, and you
13 know, the legitimate quest for evidence that's going to assist
14 you in solving crime.

15 MR. DAVIS: Well, they found the thing. I don't
16 think there's any question about that. Whether or not it was
17 justified, I think it's a very close question and I would
18 submit it falls short.

19 THE COURT: All right.

20 MR. DAVIS: I do have one other thing to point out.
21 The United States just made representation that there was
22 language in the order. That language in the order says the
23 agencies can use those duplication of facilities to accomplish
24 the installation and use of a pen register or trap and trace
25 cellular tracking device to implement the -- to implement the

1 installation of that --

2 THE COURT: Or the use.

3 MR. DAVIS: -- and shall initiate a signal. This is
4 why -- I don't even know what that language means. I think
5 this is very sloppily -- whoever put this sentence together
6 and slapped it into the order, and it must have come when
7 people started complaining about Stingrays, they didn't think
8 this thing through because it doesn't make sense.

9 THE COURT: Yes, but I -- the question that I have
10 is whether or not Judge Glynn by signing off on that, was
11 authorizing the use of this -- these extra devices and
12 technologies to assist them in locating the phone so that they
13 can start to detect the numbers that it's receiving and
14 sending.

15 MR. DAVIS: I'd say not. I'd say not. He's
16 authorizing them to utilize -- using the telecommunications
17 providers. This sentence was thrown in there to try to cover
18 Stingrays, but it doesn't. How can he authorize that? He has
19 no information on what's going to be used, he has no
20 information about the technical requirements or -- he has no
21 idea what they're going to use. He has no idea if it's going
22 to be recorded, he has no idea how long they're going to be
23 doing it, he has no idea who's going to be doing it. This
24 order does not authorize them to use a Stingray.

25 And someone pointed out to me, and I don't know if I

1 argued this, but even though they find that the pocket is
2 emitting a digital fingerprint, doesn't that just give them
3 the right to obtain a warrant to search the person as opposed
4 to just grab the person and search them? I mean, it's --
5 everything kind of builds on everything here.

6 I don't think this judge authorized them to use an
7 unmonitored unrecorded gadget to track this phone down. I
8 think this judge authorized them to use telecommunications
9 providers despite the fact someone drafted this sentence and
10 put it in there trying to cover something else. And if you
11 look at it, if you take everything and put it all in context,
12 the last paragraph tells what the judge really thought he was
13 authorizing and that was to have the telecommunications
14 service providers provide law enforcement with the information
15 they're seeking. And that information that they give them is
16 recorded and kept track of, and there are time limits kept on
17 it. And it talks about who can do it, and there's a buffer
18 zone between law enforcement and the gathering of this
19 information.

20 THE COURT: What about the -- well, let me let
21 Mr. Martinez finish with this question first, of whether
22 there's probable cause demonstrated in the affidavit and
23 enough of a basis provided to justify what the officers
24 ultimately did once they got the order.

25 MR. MARTINEZ: Sure. With respect to the probable

1 cause, Detective Cirillo's application, which is Exhibit 13 to
2 the government's motions response, laid out a lot of
3 information and I would break it down into six separate
4 components that all taken together support a finding of
5 probable cause. One, he explains Moses Malone is murdered in
6 the 600 block of Cokebury Avenue on May 2nd of 2013. Second,
7 he explains that at the time it was law enforcement's belief,
8 which turned out to be accurate that Malone was murdered
9 because he had been a witness to a nonfatal shooting or a
10 victim of a nonfatal shooting.

11 Third, it pointed out that the homicide detective
12 investigating Malone's murder had identified a BGF member
13 named Trevon White as a co-conspirator, who was involved in
14 the murder. Fourth, it pointed out that the detective had a
15 confidential informant, who reported having witnessed a
16 conversation in which White called the shooter and set up the
17 murder. It also pointed out that Detective Hunter had
18 obtained toll records for that informant, which showed
19 outgoing calls to the 7094 telephone that was found on
20 Mr. Brown.

21 So based on all that information, Detective Hunter
22 believed that the person utilizing the (443) 310-7094
23 telephone was most likely the person who had murdered Malone.
24 That's why he asserted that there was probable cause to track
25 the phone in the application that Detective Cirillo submitted

1 to Judge Glynn So we submit when you take that all together,
2 Your Honor, that's probable cause to show, A, that that 7094
3 telephone number was used in connection with and will contain
4 evidence of Malone's murder; and B, the person who used the
5 phone was, in fact, the murderer, which is what we've alleged
6 in this case. So that covers probable cause.

7 THE COURT: Okay. Was the probable cause directed
8 at going and finding the phone and getting the phone?

9 MR. MARTINEZ: Indeed, that's the whole purpose of
10 the application. And the authorization that Detective Cirillo
11 requested, it does track -- and Judge Glynn issued exactly the
12 order that Detective Cirillo proposed, but this gets us back
13 to the question of what did BPD ask for, what did the order
14 cover? I don't want to belabor the point, Your Honor, but the
15 language we just went over dealing with site surreptitious or
16 duplication of facilities, and that is describing what a cell
17 site simulator does, it mimics a cell tower, and it then takes
18 the unique identifiers of a cell phone and takes the signals
19 that are in the area and pulls that identifier out of the air.

20 And so initiating a signal to determine the location
21 of a target cell phone, that's again a description of what the
22 cell site simulator does. So it was clear they're showing
23 probable cause to believe that the phone was used in
24 connection with the murder. They're asking the judge, hey,
25 Judge, we want to use a bunch of different methods of

1 tracking, including pinging, which they reference as the
2 mobile locator too, but also including this cell tracking
3 device, which entails surreptitious or duplication of
4 facilities.

5 There's no hiding of the ball here. They're telling
6 the judge the different techniques they want to use and the
7 judge is finding that yes, there's probable cause, and yes,
8 I'm ordering that you're authorized to use all these
9 techniques. And so under these circumstances they certainly
10 acted reasonably, if indeed the Court concludes that using the
11 cell site simulator was a search.

12 THE COURT: Thanks. I'm ready to rule.

13 MR. DAVIS: Your Honor, may I -- the dog question,
14 something occurred to me.

15 THE COURT: The dog question.

16 MR. DAVIS: If a dog alerts to a person, you can
17 stop the person and do a *Terry* stop, but they still need to
18 get a warrant to search the person.

19 THE COURT: Yes, but how many times have you seen
20 where a *Terry* -- they do the *Terry* stop and they find the
21 contraband, the gun, or in this case, a phone that they're
22 looking for, and they leave it in the hands of the *Terry*
23 *stopped* person? Once they've found it, they've got a
24 connection to him.

25 MR. DAVIS: They didn't find it until they took it

1 out of his pocket. They used that device --

2 THE COURT: You can take stuff out of people's
3 pockets as part of the *Terry* stop.

4 MR. DAVIS: That isn't the justification for this.
5 The justification is, is that they're arguing that they had
6 approval from a judicial officer to utilize a private
7 device.

8 THE COURT: Well, I recognize that, and I really
9 will say that I think a lot of what's going on here is actual
10 shadowboxing for the main event, and you are not in the main
11 event, Mr. Francomano is. You -- your situation is different.
12 There was an order in this particular case. Got anything --
13 something else? Otherwise, I'm ready to rule.

14 MR. DAVIS: No, that's it.

15 THE COURT: So largely for the reasons that the
16 government has articulated, both in their papers and in their
17 oral argument today, I find no problem with what happened to
18 Mr. Brown in terms of how the presence of that phone was
19 detected on him and how it was taken from him. Hard questions
20 of the sort that Mr. Davis and I were debating a few moments
21 ago aren't actually really answered by this ruling because I'm
22 relying more on the fact that the order was entered.

23 And I find that the affidavit, having looked at it
24 previously, before we even got into court here today, does
25 disclose or amount to probable cause to believe that there is

1 a connection between the item being pursued and searched for,
2 and the information relating to it, and criminal activity, and
3 that while the affidavit and especially the order could be
4 more artfully drafted, for sure, and I don't even quarrel,
5 Mr. Davis, with your suggestion that somebody took an old form
6 and then took something that they heard about or got worried
7 about from some other court proceeding and somehow slapped it
8 in there, that that may well be what happened. But still, the
9 sum total of the words and sentences that are in Judge Glynn's
10 order, in my judgment, authorized what happened here. So that
11 argument, that request for suppression is denied. And I think
12 that takes care of the Wesley Brown portion of this category
13 of dispute.

14 Do you agree, Mr. Davis?

15 MR. DAVIS: It does. And again, as I stated
16 earlier, the statement that he is alleged to have made after
17 he was taken to the police station --

18 THE COURT: Is the fruit of it.

19 MR. DAVIS: They just -- they're not using anything
20 he said afterwards. He was released from the station after
21 they took the phone.

22 THE COURT: Is that right, you're not going to use
23 that statement?

24 MR. MARTINEZ: We have suggested in our paper that
25 we have no intention of offering any of that statement as part

1 of our case in chief.

2 THE COURT: To the extent that Mr. Davis's motion is
3 also directed at that statement, that portion of it's denied
4 as moot.

5 All right. Now, we go over to the main event. And
6 with respect to Mr. McCants, there wasn't any order. Now,
7 this dispute comes to us in two distinct parts, as far as the
8 Court is concerned: Exigent circumstances and then after the
9 exigent circumstances had resolved. You claim that they still
10 fear that they had an armed and dangerous person on the
11 streets and so on and so forth. But it wasn't the same
12 exigency that existed at the start; right?

13 MR. MARTINEZ: I would say the exigency did not
14 resolve itself, Your Honor, until Mr. McCants walked out of
15 5617 Pioneer Drive and surrendered to authorities.

16 THE COURT: I understand your position. Let me
17 start with Mr. Francomano.

18 MR. FRANCOMANO: Yes, Your Honor.

19 THE COURT: And you don't dispute the state of the
20 law with respect to the exigent circumstances exception to the
21 warrant requirement.

22 MR. FRANCOMANO: No, Your Honor. We agree that
23 there are a number of exceptions to the warrant requirement,
24 but we don't believe that there was an exigent circumstances
25 in this case. That would be -- would allow -- to not have the

1 warrant. So that's our argument, Your Honor --

2 THE COURT: All right.

3 MR. FRANCOMANO: -- that there was no exigency.

4 THE COURT: All right. So what do we need in terms
5 of facts? Do we have an agreement on facts and just a dispute
6 as to whether it was exigent, or when it became nonexigent, as
7 the Court has described it, or do we have a dispute on facts?
8 Counsel, what do you think?

9 MR. MARTINEZ: I think that's largely up to
10 Mr. Francomano. I can tell the Court what we're prepared to
11 offer today in terms of proof.

12 THE COURT: Why don't you make a proffer as to what
13 that would look like and then Mr. Francomano will react to
14 that by saying we agree, that's what the evidence would be, or
15 no, I'm not agreeing to that.

16 MR. FRANCOMANO: Yes, Your Honor.

17 THE COURT: You're perfectly within your rights to
18 go either way on it, Mr. Francomano.

19 MR. FRANCOMANO: Thank you.

20 THE COURT: Yes.

21 MR. MARTINEZ: So the initial witness we'd call to
22 lay the factual context for this motion would be Sergeant
23 Landsman of Baltimore Police Department. He's the one who
24 initiated the exigent request. He would testify that he's
25 been involved in prior BGF-related investigations and through

1 that became familiar with Mr. McCants and his speaking voice.
2 He knew about some of the historical crimes Mr. McCants was
3 suspected of committing and that he was aware that Mr. McCants
4 had been indicted by a grand jury in November of last year but
5 had fled --

6 THE COURT: Was a fugitive.

7 MR. MARTINEZ: Correct. So Sergeant Landsman was
8 aware of all of those things as of early this year, late
9 January of 2017. And at the time he was a deputized task
10 force officer with the FBI Safe Streets Group, and they were
11 on a wiretap of a BGF target named Deandre Dorsey. And lo and
12 behold, on January 26th of 2017, the FBI intercepts telephone
13 calls between Dorsey and Mr. McCants.

14 THE COURT: Stop right there. That's basically the
15 introduction to the critical moments, true? You're about to
16 go into the critical portion of it. First of all,
17 Mr. Francomano, any difference with the way the government has
18 described up to this point?

19 MR. FRANCOMANO: The only exception is that there's
20 never been any evidence that Mr. Dorsey is BGF. Other than
21 that, we have nothing.

22 MR. MARTINEZ: Sergeant Landsman would be prepared
23 to testify that they have identified him as BGF, that he had
24 connections to the Greenmount Avenue corridor. He had been
25 shot there in December of 2016. And he could expand on his

1 findings and the findings of the Safe Streets Group as to why
2 Mr. Dorsey was BGF.

3 THE COURT: So my question is not do you dispute
4 that, that's not my question, that's not where -- you can't
5 put that question to a defense lawyer. My question is, do you
6 agree to that?

7 MR. FRANCOMANO: I agree with what he's saying.
8 Whether or not Dorsey is BGF, at this point, has no bearing on
9 the exigency.

10 MR. MARTINEZ: It has a bearing on his severance
11 motion, which is why he doesn't want to concede it.

12 MR. FRANCOMANO: That's exactly right, Your Honor,
13 I'm not conceding in any way.

14 MR. MARTINEZ: So to the extent that matters, we're
15 happy to call Sergeant Landsman and have him explain why the
16 FBI has identified Dorsey as BGF.

17 THE COURT: And then where will you go from that in
18 your proffer? After you've got -- if you were to get that
19 successfully established, where would you go?

20 MR. MARTINEZ: So then we would have -- we played
21 five wiretap calls for the sergeant and they were intercepted
22 by the FBI wiretap between January 26th of 2017 and February
23 4th. We've summarized the contents of those calls in some
24 detail.

25 THE COURT: In the papers.

1 MR. MARTINEZ: In the papers, and I don't know
2 whether Mr. Francomano is prepared --

3 THE COURT: Yes, are we in a dispute about that, do
4 we need to take that testimony from the officer?

5 MR. FRANCOMANO: Your Honor, I think we have to.
6 It's so subjective.

7 THE COURT: No problem at all. You don't have to
8 shake your head or anything else. All I want to know is if
9 you say yes, we're doing it.

10 MR. FRANCOMANO: We have to, Your Honor.

11 THE COURT: All right. So I think you've told as
12 much of the tale as you can tell by virtue of a proffer and
13 now we've got to go over to the live evidence.

14 MR. MARTINEZ: Fair enough, Your Honor.

15 THE COURT: Call him.

16 MR. MARTINEZ: Okay. Can I have the Court's
17 indulgence to set this up so I can play --

18 THE COURT: Let's see.

19 (Pause in the proceedings.)

20 THE COURT: Back on the record. All right. We're
21 going to take the lunch break. We'll be in recess until 2:45
22 and pick up at that point. My expectation is that we'll then
23 go from 2:45 until 4:30, when I'm advised that the individual
24 who was in court previously wishes to return, for us to
25 continue on with what had been initiated this morning but

1 required a short pause. So we'll continue on with that at
2 4:30. That's my expectation at this point, just so counsel
3 can have some sense of what's coming. Mr. Davis.

4 MR. DAVIS: Your Honor, I just -- I don't want to
5 hold everyone here, but I just noticed there's one final issue
6 on document 221 that was the actual search of the white cell
7 phone that was what we were talking about, the gadget stuff.

8 THE COURT: Yes.

9 MR. DAVIS: They searched it three years later.
10 They got a federal warrant. We would just ask Your Honor to
11 take a look at the warrant and rule on whether the probable
12 cause exists for that warrant to have issued. We'd submit
13 that their hanging onto the phone for three years until
14 technology got to a point, actually until they paid the
15 Israelis \$3 million to get the technology to open up the Apple
16 iPhones, we'd submit that that delay was unreasonable and,
17 therefore, they shouldn't have gotten into the phone.

18 THE COURT: Well, where was the phone in the
19 meantime?

20 MR. MARTINEZ: The phone was in the Evidence Control
21 Unit, at ECU. And in her affidavit, Special Agent Christy, I
22 think there's a statement to the effect of, "I know that the
23 phone has been stored in such a way, so that its contents have
24 been maintained and are the same as they were when they were
25 seized in May of 2013."

1 THE COURT: Well, I think the question is whether or
2 not there was a continuing investigation in between the time
3 that the phone was seized and when the warrant was executed to
4 actually uncover its contents, because it's the holding onto
5 the phone for three years that I think is really the
6 question.

7 MR. MARTINEZ: And there was a continuing
8 investigation and, in fact, as we pointed out in our paper,
9 the key distinction between Special Agent Christy's affidavit
10 to search that phone last summer and the application that
11 Detective Cirillo submitted to track it in 2013 was that in
12 the interim two additional key pieces of evidence had been
13 uncovered because of that continuing investigation, and those
14 were, one, the statement of a witness that -- this is the same
15 witness who says he saw Trevon White make a phone call. In
16 fact, he would say Trevon White used his phone to call the
17 7094 number to set up the murder of Malone. That same witness
18 in 2016 said the day after the murder Mr. Brown claimed
19 responsibility for shooting Malone. So that's a new
20 development.

21 THE COURT: Was the ATF actively involved in a BGF
22 investigation relating in some way to individuals charged in
23 this case in 2013?

24 MR. MARTINEZ: Yes.

25 THE COURT: And would Agent Christy say so under

1 oath?

2 MR. MARTINEZ: She would.

3 THE COURT: All right. Agent Christy, stand up,
4 raise your right hand. Swear her.

5 SPECIAL AGENT LISA CHRISTY,
6 called as a witness, being first duly sworn, was examined and
7 testified as follows:

8 THE WITNESS: I do.

9 THE CLERK: Thank you. Please state your full name
10 for the record.

11 THE WITNESS: Lisa Christy, L-i-s-a,
12 C-h-r-i-s-t-y.

13 EXAMINATION

14 BY THE COURT:

15 Q And Ms. Christy, have you been continuously involved in
16 an investigation of individuals who are charged in this case
17 for some period of time?

18 A Yes, Your Honor.

19 Q Does it extend back to 2013?

20 A Further, yes.

21 Q And you personally, not to mention your agency, has been
22 involved in the continuing investigation during that time
23 period?

24 A Yes, Your Honor.

25 Q Thank you.

1 THE COURT: Mr. Francomano, any questions of Agent
2 Christy?

3 MR. FRANCOMANO: I don't have any questions, Your
4 Honor. I believe that Mr. --

5 THE COURT: Excuse me, Mr. Davis. I'm sorry. Any
6 questions?

7 MR. DAVIS: No, I have no questions of the agent.

8 THE COURT: Thank you, ma'am. You may be seated.

9 Okay. I'm ready to rule on it. They had the
10 evidence the whole time. They're involved in a longitudinal
11 and continuing investigation from 2013 to 2016. The point
12 that's critical in my mind is, did they arrive at a point
13 where they should have been returning evidence back to those
14 from whom it had been seized? My finding is that based on the
15 totality of information that's been presented in this case so
16 far, plus Agent Christy's testimony just this moment, is no,
17 that's not unreasonable that they held onto that phone that
18 long and the fact they still had it and then discovered that
19 they had the technology to get into it is permissible. So
20 that motion -- that element of -- was it 221?

21 MR. DAVIS: I'm sorry, Your Honor?

22 THE COURT: That element of 221.

23 MR. DAVIS: That is an element of 221.

24 THE COURT: That element of 221 is also denied.

25 Now we'll take the lunch break. Still 2:45. The

1 defendants are remanded. Counsel are excused until 2:45.

2 We'll pick up then.

3 (A recess was taken.)

4 THE COURT: Good afternoon. Be seated, please.

5 Okay. Ready to take evidence, Mr. Martinez, on this
6 question?

7 MR. MARTINEZ: Yes, ready to begin with the
8 testimony of Sergeant Landsman, BPD.

9 THE CLERK: Good afternoon, sir, please raise your
10 right hand.

11 SERGEANT JOSEPH LANDSMAN,
12 called as a witness, being first duly sworn, was examined and
13 testified as follows:

14 THE WITNESS: Yes, I do.

15 THE CLERK: You can have a seat. Please state and
16 spell your first and last name for the record.

17 THE WITNESS: Joseph Landsman, J-o-s-e-p-h,
18 L-a-n-d-s-m-a-n.

19 THE CLERK: Thank you.

20 MR. MARTINEZ: May I begin, Your Honor?

21 THE COURT: Your witness.

22 DIRECT EXAMINATION

23 BY MR. MARTINEZ:

24 Q Sir, good afternoon.

25 A Good afternoon.

1 Q Could you tell us where you work.

2 A Baltimore Police Department.

3 Q Do you also work for any federal law enforcement
4 agencies?

5 A Yes, sir.

6 Q What agency is that?

7 A Federal Bureau of Investigations task force, FBI Safe
8 Streets Task Force.

9 Q And what's your rank with the BPD?

10 A Police sergeant.

11 Q And how about with the FBI?

12 A Task force supervisor.

13 Q How long have you been with BPD?

14 A Since July of 2000.

15 Q How about the FBI?

16 A Since October of 2015.

17 Q Over the last six years, Sergeant, have you participated
18 in an ongoing investigation of criminal activity by the Black
19 Guerilla Family's Greenmount Avenue Regime?

20 A Yes, sir.

21 Q As part of that investigation, have you become familiar
22 with an individual named Marquise McCants?

23 A Yes, I have.

24 Q Do you see Mr. McCants in court today?

25 A To the far left, the second row facing the courtroom,

1 Marquise McCants.

2 THE COURT: The record will reflect that the witness
3 has identified the defendant Marquise McCants.

4 Q (BY MR. MARTINEZ) Sergeant, over the course of your
5 participation in investigating the BGF Greenmount Regime, have
6 you been able to determine whether Mr. McCants goes by any
7 nicknames or street names?

8 A Yes, I have.

9 Q What nickname is that?

10 A Digga.

11 Q Could you spell that, please.

12 A D-i-g-g-e-r or D-i-g-g-a.

13 Q During the course of your investigation of the BGF
14 Greenmount Regime, have you had an opportunity to listen to
15 recorded jail calls in which Mr. McCants participated?

16 A Yes.

17 Q So are you familiar with his speaking voice?

18 A Yes, I am.

19 Q Sergeant, do you know when Mr. McCants was first charged
20 by the grand jury in connection with this case?

21 A November 2016.

22 Q Do you know whether an arrest warrant was issued for
23 Mr. McCants at that time?

24 A Yes, it was.

25 Q Do you know whether back in November law enforcement was

1 able to take Mr. McCants into custody on that arrest
2 warrant?

3 A They were not.

4 Q So did there come a point in time where Mr. McCants was
5 designated a fugitive?

6 A Yes, sir.

7 Q I want to direct your attention to late January of this
8 year, 2017. Was Mr. McCants still a fugitive at that time?

9 A Yes, he was.

10 Q And as of January 2017, were you also participating in an
11 investigation of a suspected BGF member named Deandre
12 Dorsey?

13 A Yes, I was.

14 Q Can you explain for the Court why it was that law
15 enforcement suspected Mr. Dorsey to be a member of BGF?

16 A Deandre Dorsey had been identified by individuals as
17 being a member of BGF in the area of Anne Arundel County, as
18 well as in the area of Greenmount Avenue.

19 Q And you say individuals who identified Mr. Dorsey as
20 being a member of BGF, are these witnesses who came forward to
21 law enforcement?

22 A Yes.

23 Q Can you give us a sense of how many witnesses?

24 A Four, at this time.

25 Q Had you also intercepted wiretap conversations in which

1 Mr. Dorsey participated?

2 A Yes, I did.

3 Q Were any of those conversations with other BGF members?

4 A Yes, they were.

5 Q What kinds of issues were discussed during those calls?

6 A There were issues discussed about taxing, paying a \$100
7 for selling heroin in a certain area, bushmen had wanted that
8 payment from Deandre Dorsey based on his heroin sales, and the
9 discussion that Dorsey was having with another BGF member
10 about how that same protocol was not going to fall into place
11 on the street. It may be in place in jail, but not the way
12 he's operating. And Dorsey continued to show his leadership
13 role within the BGF gang that he was working with.

14 Q You mentioned the term "bushmen." Does that have any
15 particular significance with respect to BGF?

16 A It does.

17 Q What is it?

18 A The bushman is overseeing -- if it's inside the jail, is
19 going to oversee a regime that has certain rank structures and
20 operates within that jail and they'll follow that protocol.

21 Q What, if any, ties did Mr. Dorsey have to the Greenmount
22 Avenue corridor?

23 A Deandre Dorsey had family along Greenmount Avenue, he
24 supplied drugs in that area, and he was shot along Greenmount
25 Avenue on December 10th, 2016.

1 Q And can you recall the cross street of the location where
2 he was shot in December 2016?

3 A The area of 24th and Greenmount, Loch Raven and
4 Greenmount.

5 Q All right. Sergeant, last December, December 2016, did
6 there come a point time when the FBI saw judicial
7 authorization to wiretap a telephone belonging to
8 Mr. Dorsey?

9 A Yes.

10 Q In fact, was it multiple telephones?

11 A Yes.

12 Q And did one of them have a cell number of
13 (443) 454-9405?

14 A Yes.

15 Q Prior to coming to court today, did you have an
16 opportunity to review a disk that contains recordings of some
17 of those calls?

18 A Yes, sir.

19 Q I'll show you Government's Exhibit 7. Is this the disk
20 you reviewed?

21 A Yes, it is.

22 Q And does that contain certain recorded telephone calls
23 from the 9405 telephone, the line of Mr. Dorsey?

24 A Yes, sir.

25 Q Sergeant, with the Court's permission, I'm going to play

1 you some of those calls. But first I want to ask you -- I
2 want to direct your attention to January 26th of 2017 at
3 approximately 12:48 p.m. Did your ongoing wiretap capture a
4 call between Mr. Dorsey and an individual using a cell phone
5 with the number (410) 694-1321?

6 A Yes.

7 Q Was law enforcement able to identify the user of that
8 1321 telephone?

9 A Yes.

10 Q Who was it?

11 A Marquise McCants.

12 Q All right. I want to play you an excerpt of that call.
13 Ms. Hoffman will start at the beginning.

14 (Audio played.)

15 THE COURT: Stop the tape. Mr. Martinez, do you
16 have a transcript of the tape?

17 MR. MARTINEZ: We don't have a transcript prepared,
18 Your Honor. But when we get to the relevant portions of the
19 call, we're going to -- about to get to a point where the
20 speaker identifies himself and I'll ask the sergeant. But we
21 have --

22 MR. FRANCOMANO: Your Honor, I do have a transcript
23 if you need it. It was provided to me by the government.

24 MR. MARTINEZ: Those are line sheets that I wouldn't
25 characterize as a proper transcript. We have no objection to

1 Mr. Francomano providing it to the Court. We also have
2 between pages --

3 THE COURT: Well, are you offering this tape
4 recording that we're listening to here in court for its
5 content? Because if you are, I haven't understood more than
6 two or three words.

7 MR. MARTINEZ: We're offering it for -- in terms
8 of -- for its contents, but also in terms of what Sergeant
9 Landsman understood Mr. McCants and Mr. Dorsey to be
10 discussing, what actions he took in response to it. And I can
11 say that we summarized the calls between page 98 and page 101.
12 There is a transcription of the most pertinent part of the
13 last call we'll play on page 100 to 101. And then each
14 successive paragraph between 98 and 101 in our motions
15 response contains summaries with excerpts of the key terms
16 that are used in these conversations.

17 So to the extent that the Court wants something to
18 follow along with, that's helpful, and if Mr. Francomano wants
19 to provide the line sheets, those are fine too.

20 THE COURT: Well, Mr. Francomano, is that what
21 you're suggesting, that we could look at line sheets and
22 follow along on the call?

23 MR. FRANCOMANO: Your Honor, I believe that the only
24 issue is between 98 and 101, which I think that's what the --
25 two words we're looking at; is that correct? If we could just

1 get to that because that's my one argument.

2 MR. MARTINEZ: Well, we're playing the calls between
3 98 and 101 now. It's just five calls.

4 THE COURT: All right. Well, pulled up on my screen
5 right now is an indication that we're going to listen to 11
6 minutes and 43 seconds of sound. Are we going to listen to 11
7 minutes and 43 seconds? We've already listened to 2 minutes
8 and one second.

9 MR. MARTINEZ: No, Your Honor. We're going to
10 listen to five more seconds of this one, two additional short
11 excerpts of this call, and then the remaining calls will be
12 pretty short.

13 THE COURT: Okay. And there is no transcription of
14 even the last five seconds of this call, but there is a
15 transcription of other small elements that you're going to
16 present?

17 MR. MARTINEZ: There are line sheets.

18 THE COURT: Line sheets. No transcripts?

19 MR. MARTINEZ: Correct.

20 THE COURT: All right. Mr. Francomano, is it
21 acceptable to you that the Court have line sheets before it
22 while the tapes are played?

23 MR. FRANCOMANO: Yes, Your Honor.

24 THE COURT: All right. Let's hand them up.

25 I take it the government doesn't have the line

1 sheets in the courtroom?

2 MR. MARTINEZ: We don't, Your Honor.

3 MR. FRANCOMANO: If I could approach, Your Honor?

4 THE COURT: Yes. Show the line sheets to
5 Mr. Martinez first so he sees what the Court's being handed.

6 And do these line sheets start at the beginning of
7 the recording that's being played here in court or do they
8 relate only to certain parts of it?

9 MR. MARTINEZ: The top document that Your Honor is
10 looking at is a line sheet that pertains to the recording we
11 are currently playing and begins at the beginning of the
12 call.

13 THE COURT: Okay. So if I go to the back of this,
14 because you said we only have about five seconds left, is that
15 it?

16 MR. MARTINEZ: Well, we have five seconds left of
17 this excerpt.

18 THE COURT: Okay. But that might not be at the back
19 of this line sheet?

20 MR. MARTINEZ: Correct.

21 THE COURT: Any suggestion as to where we are in
22 terms of this line sheet? Mr. Francomano, maybe you were
23 following along.

24 MR. FRANCOMANO: Your Honor, we are on -- last I --
25 at page 1, 2, 3 -- bottom of page 3.

1 THE COURT: Bottom of page 3: "You should have
2 robbed the whole dice game, man"?

3 MR. FRANCOMANO: Just before that, Your Honor. I'm
4 sorry. One, two, three -- it's before we get to that.

5 THE COURT: But on that page, the fourth page: "By
6 the McDonald's"?

7 MR. FRANCOMANO: The bottom of the third page, Your
8 Honor.

9 THE COURT: Bottom of the third page. (Reading) "I
10 told you, bro. I told you that," unidentified -- "I been told
11 you that. I probably ain't paid no mind, bro, because like,
12 we rode past it yesterday. And I'm like, yo, where the
13 f-word, which a call it's still living in there. Hell, nah,
14 he moved out. I'm like" -- is that where we are?

15 MR. FRANCOMANO: I believe so, Your Honor.

16 THE COURT: Okay. Let's -- why don't we back it up.
17 Are we able to back it up ten seconds or so?

18 MR. MARTINEZ: Yes.

19 THE COURT: Start it. Thank you.

20 (Audio played.)

21 Q (BY MR. MARTINEZ) Sergeant, can you tell us whose voices
22 we were listening to just now?

23 A Deandre Dorsey and Marquise McCants.

24 Q And at the end of the excerpt we just listened to when
25 one of the parties said, "Digga, say what it is," who was

1 speaking then?

2 A Deandre Dorsey.

3 Q And was it your understanding that when Dorsey was
4 referring to Digga he was talking about the person he was
5 speaking to on the other line?

6 A Yes.

7 Q And based on your prior investigations, did you know
8 anyone who went by the nickname Digga?

9 A Yes, I did.

10 Q And did you recognize Digga's voice in listening to this
11 call?

12 A Yes, I did.

13 Q Whose voice did you recognize it to be?

14 A Marquise McCants, the unique voice that would kind of
15 squeal as he was trailing off, what he was saying, and the
16 voice that called and asked where Deandre Dorsey had been
17 at.

18 Q All right.

19 MR. MARTINEZ: Ms. Hoffman, if you could play
20 roughly the next three minutes.

21 (Audio played.)

22 THE COURT: Stop for a second.

23 (Pause in the proceedings.)

24 THE COURT: You may continue. Are we starting from
25 exactly where we stopped or have we skipped forward in the

1 conversation?

2 MR. MARTINEZ: We're starting from exactly where we
3 stopped.

4 THE COURT: Got it. Go ahead.

5 (Audio played.)

6 Q (BY MR. MARTINEZ) Sergeant, did you hear the discussion
7 during that excerpt about a "big boy joint"? I believe that
8 was about 3:45 through.

9 A Yes, sir.

10 Q Did you hear the discussion about "jimrods"?

11 A Yes, I did.

12 Q Did you hear the reference to a "blicky"?

13 A Yes.

14 Q How about the term "nickel"?

15 A Yes.

16 Q And finally, how about the term "21"?

17 A Yes, I heard all that.

18 Q At the time you were monitoring this wiretap, Sergeant,
19 what did you understand those terms to mean?

20 A All those combined indicated a gun, specifically a .45
21 caliber handgun.

22 Q Why is it that you believe it was a .45?

23 A When it gives the model number 21 after describing it as
24 using the term, "showing it was a gun, then the big one," and
25 then "21," which is the model for a Glock 21, which is a .45

1 caliber handgun.

2 Q All right. I want to play you another excerpt of this
3 call, and we're going to begin -- this will be a ten-second
4 excerpt between 8:45 and 8:55.

5 (Audio played.)

6 Q (BY MR. MARTINEZ) Sergeant, did you hear the discussion
7 there about "glizzy" and a "shootout"?

8 A Yes, sir.

9 Q At the time you were monitoring this wiretap for the FBI,
10 what did you understand those terms to mean?

11 A That he had a gun and had shot it out with someone, got
12 into a shooting with someone.

13 Q So you understood glizzy to be a reference to a firearm;
14 is that correct?

15 A Yes.

16 Q I'm going to play you one final excerpt from this call.
17 It's going to be 16 seconds between 10:45 and 11:01.

18 THE COURT: So picking up where we left off or
19 somewhere else on the call?

20 MR. MARTINEZ: Somewhere else, Your Honor. This is
21 towards the end when there's discussion about going to the
22 pound.

23 THE COURT: You may proceed.

24 (Audio played.)

25 Q (BY MR. MARTINEZ) Sergeant, did your hear -- first of

1 all, whose voices were we listening to?

2 A Dorsey McCants.

3 Q Did you hear Mr. Dorsey tell McCants to "call the pound,
4 n-word," and to get all that stuff out of the car?

5 A Yes, sir.

6 Q At the time you were monitoring this call, what did you
7 understand that to mean?

8 A The pound is a street term for the impound lot, city yard
9 off of Pulaski Highway, where Deandre Dorsey's Honda Accord
10 was towed to. And it was towed following when Deandre Dorsey
11 was shot, and it was towed following being in police custody
12 and held at the crime lab bay. Search warrant was executed on
13 the vehicle.

14 Q What was found in that vehicle?

15 A Inside the vehicle was a 9mm handgun and drugs.

16 Q And was any ballistics testing done of that 9mm?

17 A Yes, it was.

18 Q What did the testing show?

19 A Testing was a match to the spent casings that were
20 recovered from the crime scene of a murder that occurred on
21 December 10th, 2016 in the 1100 block of Curtain Avenue in
22 East Baltimore. And the spent casings on that scene from the
23 ballistic testing showed that it was fired from that 9mm
24 recovered from Deandre Dorsey's Honda Accord. So timeline was
25 that a homicide on Curtain occurred December 10th. Deandre

1 Dorsey was shot December 13th. Following Deandre Dorsey being
2 shot, his vehicle was taken into police custody and a search
3 warrant was done and that gun was recovered.

4 Q So when you intercepted this call on January 26th of 2017
5 and Mr. Dorsey told Mr. McCants to call the pound and get his
6 stuff out of the car, did you think he was talking about the
7 gun and the drugs that BPD had already found?

8 A Yes, because it was in a hidden area in the car and he
9 didn't know the police had recovered it.

10 Q All right. I want to skip forward a couple days and
11 direct your attention to February 1st of 2017 at approximately
12 11:28 p.m.

13 Did your wiretap capture another conversation between
14 Mr. Dorsey and Mr. McCants at that time?

15 A Yes.

16 Q I'm going to play you an excerpt of that call.

17 MR. MARTINEZ: And Your Honor, we're now on a new
18 document. This will be the following document. And we're
19 going to start about 54 seconds in because the first several
20 seconds are very difficult to hear.

21 (Audio played.)

22 Q (BY MR. MARTINEZ) We're going to skip forward now to
23 2:10 because this next section is very difficult to hear as
24 well.

25 (Audio played.)

1 Q (BY MR. MARTINEZ) Sergeant, can you tell us whose voices
2 we were just listening to?

3 A Deandre Dorsey, Marquise McCants.

4 Q And during the three and a half minutes or so that you
5 heard, could you summarize what you understood Mr. McCants and
6 Mr. Dorsey to be talking about?

7 A McCants -- Marquise McCants was talking about -- just
8 telling Dorsey how he had came -- went to the area of
9 Greenmount Avenue, 26th Street, 27th Street, and had seen the
10 person that they wanted to shoot. And then he would
11 describe -- Marquise McCants was describing how he was
12 possibly armed and McCants had his hood up and then McCants
13 approached another individual and had a discussion about
14 luring an individual around the corner with him.

15 McCants also discussed about trying to call TB for a
16 getaway car or also having someone there as backup because he
17 knew the person was armed.

18 Q Let me stop you for a moment. How did you know that
19 McCants was at Greenmount and 26th?

20 A He says -- refers to Greenmount as "the Mount," then he
21 talks about 26th Street and 27th Street.

22 Q And then how -- you mentioned that the individual -- you
23 understood based on this call that the individual McCants was
24 looking for was armed. Did you hear the word "clutching"?

25 A Yes, I did.

1 Q Did you hear the word "strapped"?

2 A Yes.

3 Q In the context of this conversation, what did you
4 understand those terms to mean?

5 A That individual was armed.

6 Q And did you hear the discussion about TB being a
7 getaway?

8 A Yes.

9 Q And what was your understanding of that?

10 A That once he did the shooting wanted TB there to jump in
11 the car and drive away.

12 Q Okay. I'm going to play you roughly the last minute or
13 so of this call.

14 (Audio played.)

15 Q (BY MR. MARTINEZ) Sergeant, during that excerpt we just
16 listened to, at the time you were monitoring the call at FBI,
17 what did you understand Mr. McCants and Mr. Dorsey to be
18 talking about?

19 A They continued a conversation about individuals that they
20 were going to target for violence.

21 Q And were you able to identify references to particular
22 individuals in that excerpt we just listened to?

23 A Yes.

24 Q Could you explain?

25 A Fat kid with the box on, Spaz, and Michael Jordan.

1 Q And did you have any information available to you as of
2 February 1st when this call was taking place as to who Michael
3 Jordan meant?

4 A Yes.

5 Q Could you explain?

6 A Jordan Richards.

7 Q And what was Jordan Richards's significance to this
8 investigation?

9 A An individual that Marquise McCants had been disputing
10 with.

11 Q And had he also in fact shot Deandre Dorsey?

12 A Yes.

13 Q And towards the end of the call, what was the
14 understanding of "we need to workout this weekend"?

15 A We need to shoot those three people. They were going to
16 target them and meet -- and do violence against those
17 people.

18 Q All right. I want to skip forward three more days and
19 direct your attention to February 4th of 2017. At 2:03 that
20 afternoon, did the wiretap of Mr. Dorsey's phone capture
21 another conversation between Mr. Dorsey and Mr. McCants?

22 A Yes, sir.

23 Q I'm going to play you just 45 seconds of that call
24 beginning at 1 minute. It starts out as a call with Dorsey
25 and someone else and then becomes a three-way call. We're

1 going to pick up there.

2 (Audio played.)

3 Q (BY MR. MARTINEZ) Sergeant, whose voices are we
4 listening to?

5 A Marquise McCants, Deandre Dorsey.

6 Q And during that short excerpt we just listened to, what
7 did you understand them to be talking about at the time?

8 A McCants was hurrying Dorsey, he wanted to workout.

9 Q And again, what did you understand "workout" to mean?

10 A That they wanted to shoot one of these persons that they
11 had discussed prior.

12 Q How about the statement that he, McCants, was waiting for
13 TB to get there with a dirt bike, what was your understanding
14 of that?

15 A TB was going to bring a gun.

16 Q Now, approximately two hours after this call, is there
17 another call intercepted between Mr. Dorsey and Mr. McCants?

18 A Yes, sir.

19 Q I'll play this one in its entirety.

20 (Audio played.)

21 Q (BY MR. MARTINEZ) Sergeant, whose voices were we
22 listening to?

23 A Marquise McCants and Deandre Dorsey.

24 Q And at the time, what was your understanding of that
25 discussion we just heard?

1 A McCants was communicating with Dorsey about McCants was
2 going to go out and see if the person they wanted to shoot was
3 out there, and he was going out -- McCants was indicating that
4 he was in the area of 28th and Greenmount and that he was
5 going to hang out and check if the person was outside.

6 Q And when Mr. Dorsey said, "It ain't about me, it's about
7 whenever we can get to him," what was your understanding of
8 that?

9 A That he was talking about that he could do it without him
10 being there.

11 Q All right. Did your wiretap -- and this will be the last
12 we play. Did your wiretap intercept another call between
13 Mr. Dorsey and Mr. McCants approximately two minutes later?

14 A Yes, sir.

15 Q I'm going to play you the first 2 minutes and 7 seconds
16 of this call.

17 (Audio played.)

18 Q (BY MR. MARTINEZ) All right. Sergeant, one more time,
19 whose voices were we listening to?

20 A Deandre Dorsey, Marquise McCants.

21 Q And can you summarize what you understood was being
22 discussed during the excerpt we just listened to?

23 A McCants went over how he went out and checked and the
24 person that they were targeting was not outside. And then
25 they went into further discussion, McCants and Dorsey, about

1 how they could use Tamika to lure this intended target in to
2 accomplish what they needed to do.

3 Q I want to ask you about a few specific lines we heard.
4 Do you remember hearing Mr. McCants say, "I'm glad you didn't
5 come because we would have been out that bitch for nothing, we
6 would've been out for shit after nothing." And after that,
7 Dorsey said, "Shit, we'd have to do something."

8 What was your understanding of that?

9 A That they would have went looking for one of the other
10 two intended persons that they were going to shoot.

11 Q How about with respect to Tamika, did you hear the
12 statement, "She clip her first wings, yo, get the first one,
13 yo"?

14 A That's talking about when they were going to use Tamika
15 to lure the person in, have them come around the corner, so
16 they can accomplish that. And that would be her first time,
17 and then --

18 Q Her first time what?

19 A Participating in a shooting or an act of violence.

20 Q Sergeant, in your experience, when you're monitoring a
21 wiretap and you suspect that the participants in --
22 intercepted conversations might be planning an act of
23 violence, what, if any, obligation do you have to stop it?

24 A Respond to that first obligation and prevent the
25 violence.

1 Q So in this case, after you listened to the calls that
2 we've just played, did you believe that there was an imminent
3 plot to commit violence?

4 A Yes, sir.

5 Q And what, at the time, did you believe the plot to be?

6 A An individual along the area of Greenmount was going to
7 be shot by Marquise McCants and Deandre Dorsey.

8 Q And in fact, during the second call we played, weren't
9 there discussions between Mr. Dorsey and Mr. McCants about
10 other targets as well?

11 A Yes.

12 Q All right. So after hearing the calls we just played,
13 and we're now talking about the afternoon of February 4th,
14 2017, what, if any, steps did you take to stop the suspected
15 violent plot from materializing?

16 A By the time of those calls, the first steps we had had
17 high visibility marked police cars and Foxtrot circling that
18 area, covering the Greenmount Avenue corridor. They went from
19 Greenmount and 33rd all the way down to the Greenmount-Preston
20 area. We had notified both districts, the Eastern District
21 Patrol and the Northern District Patrol, and they provide the
22 special attention to that area and kept the marked units
23 positioned along that corridor, which on calls you can see how
24 McCants went outside and the person wasn't out there because
25 mainly everybody at that Greenmount Avenue area had scattered,

1 had dispersed, once the patrol responded, got out on foot,
2 Foxtrot was overhead.

3 So it was at that same time when that call went. So that
4 was the initial plan, having that high visibility in that
5 corridor. The next steps were everybody involved in this was
6 called in, additional support for surveillance, and our
7 intention was for Deandre Dorsey to lead us to Marquise
8 McCants.

9 Q So you conducted surveillance of Mr. Dorsey?

10 A Yes, sir.

11 Q And you were conducting surveillance because you were
12 anticipating that he would meet with Mr. McCants, is that what
13 you're saying?

14 A Yes, sir.

15 Q So was that surveillance conducted?

16 A Yes, it was.

17 Q And were the surveillance teams able to observe a meeting
18 between Mr. Dorsey and Mr. McCants?

19 A No.

20 Q Were you still concerned at that point that the suspected
21 plot to commit violence might actually materialize?

22 A Yes, sir.

23 Q So at that point what did you do?

24 A That point I communicated with the Advanced Technical
25 Team. I had spoke to Detective Tony Clark and it was

1 discussed preparing the request for an exigent order to track
2 the cell phone number (410) 694-1321.

3 Q What is an exigent order?

4 A An exigent order is something the Advanced Technical Team
5 wants us -- and once it's prepared, it's put into that
6 document and the team will forward it over to the cell phone
7 company so we can begin receiving the GPS location data for
8 that cell phone.

9 Q At the time, Sergeant, did you also consider getting a
10 warrant to track the phone?

11 A Yes, sir.

12 Q And did you take the initial steps to prepare a search
13 warrant affidavit?

14 A Yes, sir.

15 Q But did you ultimately submit that affidavit?

16 A No.

17 Q Why not?

18 A The Advanced Technical Team, based on information we had,
19 as their protocol they had to send this information to the
20 cell phone company, and that was the steps that we took.

21 Q Right. But I'm now talking about the search warrant
22 affidavit. Had you gone the search warrant route, how long --
23 were you told how long --

24 A This was a Saturday and most likely we would not have had
25 a response back till the following Monday.

1 Q So that if you got the search warrant, the phone company
2 couldn't have given you location data until Monday. Is that
3 what you're saying?

4 A Correct.

5 Q Is that what you were told by someone from the Advanced
6 Technical Team?

7 A Yes, sir.

8 Q So you decided to go the exigent route instead?

9 A Yes, sir.

10 Q All right. I'm going to show you -- we'll mark for
11 identification only at this point --

12 THE COURT: You were told that the police department
13 doesn't have the capacity to communicate with somebody at the
14 relevant cell phone company on a Saturday such that relatively
15 quickly they can get up in real time and do real-time
16 locational monitoring on a phone?

17 THE WITNESS: The information I had was that the
18 cell phone company would not respond back to the order unless
19 it was exigent. And based on the circumstances that I
20 described to the Advanced Technical Team, that was their
21 protocol. This was exigent. You have information that
22 someone's going to be shot. We're not going to wait around --

23 THE COURT: The problem isn't with the phone
24 company, the problem is with the Court, that you can't get a
25 warrant out of the Court?

1 THE WITNESS: No, I think -- no, sir. I believe the
2 problem is more with --

3 THE COURT: You get a warrant from the Court maybe
4 on Saturday because there's certainly a duty judge, but the
5 problem is that warrant would go over to the cell phone
6 company and wouldn't be a so-called exigent order, it would
7 just be a court order.

8 THE WITNESS: Yes, sir.

9 THE COURT: And that's what you were led to believe,
10 is that because it had that status, having been signed by a
11 judge and being a court order, that it wouldn't get as fast
12 attention or response as would a nonjudicial exigent
13 circumstances order that was requested solely by a police
14 department.

15 THE WITNESS: Yes, sir.

16 MR. MARTINEZ: Thank you, Your Honor.

17 Q (BY MR. MARTINEZ) Sergeant, I'm showing you -- we're
18 marking only for identification at this point as Government's
19 Exhibit 8. Do you recognize this?

20 A Yes, sir.

21 Q Is this a request by Detective Clark to T-Mobile?

22 A Yes, it is.

23 Q Do you see the date there?

24 A Yes.

25 Q Next to the field target number, (410) 694-1321, is that

1 the cell phone number that you had intercepted communicating
2 with Deandre Dorsey in conversations we just listened to?

3 A Yes, sir.

4 Q I want to flip to the second page here. I want to direct
5 your attention to the underlined language right there. What
6 are we looking at now, Sergeant?

7 A The synopsis that I prepared and had forwarded to
8 Detective Tony Clark.

9 Q So you put together that language and sent it to
10 Detective Clark; correct?

11 A Yes, sir.

12 Q And what was the purpose of doing that?

13 A For Detective Clark to then communicate with the cell
14 phone company about the urgency of the -- receiving this data
15 and forwarding the exigent request to track that cell phone.

16 Q So this is a description by you of what you believed were
17 the exigent circumstances at the time?

18 A Yes, sir.

19 Q Could you read that paragraph for the Court, please?

20 A "During the course of an investigation involving members
21 of the Black Guerilla Family gang, detectives learned about a
22 threat. The threat was that the members of the gang are
23 planning to shoot an individual that frequents the area of
24 Greenmount Avenue. The members of this gang are planning to
25 do the shooting -- are planning to do the shooting, were

1 involved in a shooting in December" -- and there's typo, it
2 should be 2016. "The individual planning to execute the
3 shooting is in possession of the cell phone that has the
4 number (410) 694-1321."

5 Q Sergeant, the reference there to the December of 2017,
6 which you said should have been '16 shooting, was that a
7 reference to the Deandre Dorsey shooting you were telling us
8 about earlier in your testimony on Greenmount Avenue?

9 A Yes, sir.

10 Q Did you learn whether Detective Clark sent this request
11 to T-Mobile?

12 A Yes, I did.

13 Q And did you and your BPD colleagues eventually begin
14 receiving location alerts, that is, ping data, from
15 Mr. McCants's phone?

16 A Yes, sir.

17 Q I'm going to show you Government's Exhibit 9A. Do you
18 recognize this?

19 A Yes, I do.

20 Q What is it?

21 A It is the location data record that was sent on February
22 4th, 2017 as we were receiving the initial messages from the
23 phone company.

24 Q So this is the first alert you received for the phone?

25 A Yes, sir. 10:50 p.m.

1 Q 10:50 p.m. here?

2 A Yes, sir.

3 Q How about -- you see this uncertainty here, 40 meters?

4 A Yes, sir.

5 Q What is that telling you?

6 A It's the range that this -- the location data coming in,
7 how close it is to that area.

8 Q So it's plus or minus 40 meters; correct?

9 A Yes, sir.

10 Q Are these the latitudinal and longitudinal coordinates of
11 the phone?

12 A Yes.

13 Q And here, is this a link that you were able to click on
14 and see a map that showed the location of the phone?

15 A Yes, sir.

16 Q All right. So flipping to page 2 here, is this the map
17 that appeared when you clicked on the link?

18 A Yes, sir.

19 Q And where does that map show the location of the 1321
20 phone as of February 4th, 2017 at 10:50 p.m.?

21 A Greenmount and North Avenue in the 400 block of East
22 North Avenue.

23 Q Sergeant, at approximately the same time as you received
24 this location alert, were you notified by other law
25 enforcement officers that a shooting had just taken place?

1 A Yes, sir.

2 Q Do you remember learning the location of that shooting?

3 A Yes.

4 Q Where was it?

5 A Right where this GPS location data was, in the 400 block
6 of East North Avenue.

7 Q When, in relation, to this initial ping hit did you get
8 the notification of the shooting?

9 A The same time.

10 Q Were you notified of the victim, of the shooting's
11 name?

12 A Yes.

13 Q What was it?

14 A Gregory Bess.

15 Q Were you notified how many times Mr. Bess had been
16 shot?

17 A Yes.

18 Q How many times?

19 A More than once.

20 Q Were you notified later as to what kind of shell casings
21 were recovered from the scene?

22 A Yes.

23 Q What kind?

24 A .40 caliber.

25 Q So after you learned of the shooting, Sergeant, did you

1 believe you were still facing exigent circumstances?

2 A Yes, sir.

3 Q Why?

4 A The discussions that myself and other members of FBI had
5 heard during the discussions was there was more than one
6 intended victim and that as of this shooting that the person
7 was still armed and was not located on the scene.

8 Q And what was Mr. McCants's status with respect to the
9 outstanding arrest warrant at the time?

10 A Still a fugitive on the run.

11 Q After the shooting, did you continue receiving ping
12 alerts from T-Mobile for Mr. McCants's phone?

13 A Yes, sir.

14 Q I want to show you now what's been marked as Government's
15 9B. Do you recognize this?

16 A Yes, I do.

17 Q And is this an 11:05 p.m. alert from Mr. McCants's
18 phone?

19 A Yes, sir.

20 Q And in fact, were you receiving alerts from the phone
21 company every 15 minutes?

22 A Yes.

23 Q Okay. So the same deal here; right, latitudinal
24 coordinates?

25 A Yes, sir.

1 Q Longitude, and then what's the uncertainty?

2 A 13 meters.

3 Q And is this the link you can click to see the map where
4 the phone is?

5 A Yes.

6 Q All right. So flipping over to page 2, is this the map
7 that appeared when you clicked on the link?

8 A Yes, it is.

9 Q So according to this map, what was the location of the
10 1321 telephone as of 11:05 p.m., approximately 15 minutes
11 after the shooting on February 4th of 2017?

12 A It was in the 5600 block of Pioneer Drive.

13 Q And what's this cross street right here?

14 A Roselawn Avenue.

15 Q Let me show you one more location alert.

16 THE COURT: Let me see all counsel at the bench.

17 (Bench conference off the record.)

18 THE COURT: This is really just a logistical
19 problem. We're running behind on this hearing because of
20 other things that have interfered. And I want to be able to
21 keep going, but I'm scheduled to take Mr. Faison's guilty plea
22 at 4:30.

23 I don't want to stop this proceeding in order to
24 accomplish that, Mr. Martinez, so I've arranged for Judge
25 Blake to take Mr. Faison's guilty plea, allowing us to keep

1 pushing ahead here. The question is, can the government
2 staff, somehow, a supervisor who can cover for you for that
3 guilty plea hearing so that you and counsel can stay right
4 here and keep going?

5 MR. MARTINEZ: Yeah.

6 THE COURT: You want to step out in the hallway and
7 make arrangements?

8 MR. MARTINEZ: Yeah, if Your Honor will permit us
9 just a couple minutes.

10 THE COURT: Yes. I'm going to stay on the bench and
11 we'll take a stretch break while you're out in the hallway.

12 MR. MARTINEZ: All right. Thank you.

13 (Pause in the proceedings.)

14 THE COURT: We're going to take a brief recess. I
15 want the defendants to remain in court.

16 (A recess was taken.)

17 THE COURT: You may continue.

18 Q (BY MR. MARTINEZ) Sergeant, as we broke just now, I'm
19 showing you Government's Exhibit 9C. Do you recognize that?

20 A Yes, I do.

21 Q And what is it?

22 A It's another location data report for the cell phone
23 (410) 694-1321 from February 4th and it's indicating a
24 51-meter hit.

25 Q 51 meters. What time was the alert sent?

1 A At 11:20 p.m.

2 Q So this is the next alert after the 11:05 alert I just
3 showed you; correct?

4 A Yes.

5 Q And again, it has a link you would click to see the map
6 showing the location of the 1321 telephone?

7 A Correct.

8 THE COURT: Wait a minute, wait a minute, wait a
9 minute. What's the time sequence?

10 THE WITNESS: It's 11:20 p.m., but when the data
11 comes in, it indicates Pacific Standard Time, so there's -- it
12 will give ours up top when it says from/sent Saturday,
13 February 4th, 2017, 11:20 p.m. And then on the actual report
14 coming from wherever it is, they're given a Pacific Standard
15 Time, three-hour difference.

16 THE COURT: So your testimony is this is all the
17 same day?

18 THE WITNESS: Yes, sir.

19 THE COURT: And it is the progression through that
20 same evening?

21 THE WITNESS: Yes, sir.

22 THE COURT: Okay. Despite those -- you've explained
23 the time discrepancy.

24 THE WITNESS: Yes, sir.

25 THE COURT: All right.

1 Q (BY MR. MARTINEZ) And just to further clarify, Sergeant,
2 the initial alert we showed you was 10:50 p.m.; correct?

3 A Yes, sir.

4 Q And that was the hit from North and Brentwood; right?

5 A Yes, sir.

6 Q And then we showed you 11:05, 15 minutes later?

7 A Yes, sir.

8 Q And that's Pioneer and Roselawn?

9 A Yes, sir.

10 Q And I'm currently showing you item 3, ping hit 3, and
11 this is 15 minutes later, 11:20, that is 30 minutes after the
12 shooting at North and Brentwood?

13 A Yes, sir.

14 THE COURT: At where?

15 THE WITNESS: Greenmount Avenue and -- Greenmount
16 and North Avenue. 400 block East North Avenue. He said North
17 and Brentwood, it's between Brentwood and Greenmount Avenue,
18 that 400 block of East North Avenue.

19 THE COURT: Let's correlate it to particular pings.
20 The first ping came to the location that you just provided?

21 THE WITNESS: Yes, sir.

22 THE COURT: The second ping came from Pioneer?

23 THE WITNESS: Yes, sir.

24 THE COURT: Further northeast?

25 THE WITNESS: Yes, sir.

1 THE COURT: The third ping came from?

2 THE WITNESS: Northeast Pioneer. Again, Pioneer
3 Drive, 5600 block.

4 THE COURT: Same location as the second ping?

5 THE WITNESS: Yes, sir.

6 Q (BY MR. MARTINEZ) Is that fact shown by the map that you
7 got by clicking on the link we were just looking at,
8 Sergeant?

9 A Yes, sir. That's the 5600 block of Pioneer Drive, same
10 location as the second ping.

11 Q And did you continue receiving ping hits every 15 minutes
12 for Mr. McCants's phone for the next two hours or so?

13 A Yes, sir.

14 Q Did the location of the phone change or did it stay there
15 on the 5600 block of Pioneer Drive for the rest of the
16 night?

17 A It stayed there.

18 Q After receiving the ping alerts I just showed you, did
19 law enforcement make any additional efforts to further
20 pinpoint the location of the 1321 telephone?

21 A Yes, sir.

22 Q Could you describe those efforts for us, please?

23 A The Advanced Technical Team investigator Tony Clark used
24 his cell site simulator to give the exact location of the cell
25 phone.

1 Q And so --

2 THE COURT: We have to take a recess. The
3 defendant's are remanded. We'll resume hopefully within the
4 next 15 minutes.

5 (A recess was taken.)

6 THE COURT: You may continue, Mr. Martinez.

7 Q (BY MR. MARTINEZ) Sergeant, when we left off, I believe
8 I was asking you about the additional steps that were taken to
9 pinpoint the location of Mr. McCants's phone after the receipt
10 of the three ping alerts we just went through.

11 Do you remember those questions?

12 A Yes, sir.

13 Q And you were explaining that you had been in contact with
14 Detective Clark; is that right?

15 A Yes, sir.

16 Q And could you pick up the story there and tell us what
17 Detective Clark told you he had done?

18 A Detective Clark used the cell site simulator to find the
19 exact location of that cell phone with the number
20 (410) 694-1321.

21 Q And using the cell site simulator, where did Detective
22 Clark determine the 1321 telephone to be?

23 A Inside of 5617 Pioneer Drive.

24 Q And once you learned that information from Detective
25 Clark, specifically the fact that the 1321 telephone was

1 inside 5617 Pioneer Drive, what did you do next?

2 A Met with the other investigators from U.S. Marshals,
3 Maryland State Police, and FBI, and then responded to the
4 address of 5617 Pioneer Drive. Investigators surrounded the
5 address, I walked to the front entrance and knocked on the
6 front door.

7 Q All right. I want to show you Government's Exhibit 11A.
8 What are we looking at here, Sergeant?

9 A Address of 5617 Pioneer Drive.

10 Q And so is that the door you approached and knocked on as
11 you were just describing?

12 A Yes, sir.

13 Q What happened after you knocked on the front door?

14 A Marquise McCants ran from the second floor and then into
15 the basement, and investigators and myself went down to that
16 basement window and could see McCants grab a black bag from
17 the closet. McCants then ran into the basement bathroom, then
18 came back out, and McCants was removing items from the black
19 bag, then discarded the black bag back onto the ground and ran
20 back upstairs.

21 Investigators in the rear location began to give
22 information that McCants was coming out the rear second floor
23 window. And then after that, all investigators were in a
24 position, a safe position, and had the house surrounded. And
25 if McCants was seen, they gave his position.

1 Q Were you given any information as to whether Mr. McCants
2 went back inside the house after he came out of the second
3 floor rear window?

4 A Yes.

5 Q Yes, he did go back --

6 A He did go back inside.

7 Q All right. So after he went back into the house, did law
8 enforcement eventually contact him by calling his cell
9 phone?

10 A Yes, sir.

11 Q Can you recall who made the contact with McCants on the
12 cell phone?

13 A Sergeant Siddique from Maryland State Police.

14 Q And Sergeant Siddique with the fugitive apprehension
15 team?

16 A Yes, sir.

17 Q And after speaking with Sergeant Siddique, did McCants
18 eventually agree to come out of the house?

19 A Yes, he did.

20 Q Once Mr. McCants came back outside the house and was
21 taken into custody, did you know at the time, Sergeant,
22 whether there was anyone else inside the house?

23 A No, I did not.

24 Q Were you concerned that there might be additional people
25 in the house?

1 A Yes, sir.

2 Q Why?

3 A Based on the calls that we had listened to, we believed
4 that McCants -- that other persons were involved and that
5 there could be someone else inside that was armed.

6 Q And so what did you do to determine whether anyone else
7 was in the house who may have been armed and posed a threat to
8 either law enforcement or the public?

9 A Entered the home as a team and did a protective sweep for
10 any persons who may have been armed inside the home.

11 Q Who else was with you as you did your protective sweep?

12 A Members of the Marshals, FBI, and the Maryland State
13 Police.

14 Q And during the course of that protective sweep, did you
15 discover anyone else inside the house?

16 A No, sir.

17 Q While conducting the protective sweep, did you observe
18 any items of evidence in plain view?

19 A Yes.

20 Q What did you see?

21 A There was .40 caliber ammunition in that basement toilet
22 that McCants -- in that area where McCants ran into with the
23 black bag. The black bag was open. There was drug items,
24 paraphernalia, such as a sifter and gelatin capsules.

25 Q After conducting the protective sweep, Sergeant, did you

1 obtain a state search warrant for 5617 Pioneer Drive?

2 A Yes, sir.

3 Q Did you execute the warrant later that night -- or I
4 should say early on the morning of February 5th?

5 A Yes.

6 Q What, if anything, did you see when executing that
7 warrant?

8 A .40 caliber ammunition, the cell phone that had the
9 number (410) 694-1321, the drug paraphernalia, photographs,
10 and paperwork.

11 Q Did you find a firearm while searching the residence on
12 February 5th of 2017?

13 A No.

14 Q Following the search of the residence, that initial
15 search on February 5th of 2017, did you later become aware of
16 evidence suggesting that there was in fact a firearm in the
17 house?

18 A Yes.

19 Q What evidence was that?

20 A Marquise McCants talking about where he hid the gun
21 inside the home and trying to direct someone to get the gun.

22 Q And so you're describing conversations involving
23 Mr. McCants. What kind of conversations were these, Sergeant?

24 A Jail call conversations.

25 Q Okay. How many jail calls are we talking about?

1 A Three or four.

2 Q Okay. And in those calls, you're saying he was
3 describing to associates where he had hidden the piece of
4 evidence?

5 A Yes, sir.

6 Q And based on those conversations, I take it, law
7 enforcement suspected he was talking about a firearm?

8 A Yes.

9 Q And so based on those calls, did there come a time where
10 you sought a second state search warrant for 5617 Pioneer
11 Drive?

12 A Yes.

13 Q When did you get that warrant?

14 A On February 7th.

15 Q Is -- are you sure about that, Sergeant?

16 A February -- February 8th.

17 Q Thank you. And did you execute the warrant the following
18 day?

19 A Yes.

20 Q And when you executed that warrant on February 9th, 2017,
21 what did you find while searching 5617 Pioneer Drive on that
22 occasion?

23 A In the area where Marquise McCants had described on that
24 second floor beneath the sink, reached a left, there was a
25 hole that led to the wall and then beneath the floor. And in

1 that hole was the .40 caliber handgun that was dismantled.

2 Q You mean taken apart?

3 A Yes, it was in pieces.

4 Q Okay. So you seized a .40 caliber firearm from behind a
5 wall near the sink in the upstairs bathroom. Did I understand
6 you correctly?

7 A Yes.

8 Q And after you recovered that .40 caliber firearm on
9 February 9th, did you submit it for ballistics testing?

10 A Yes.

11 Q What, if anything, did the ballistics testing show?

12 A The ballistics testing showed that that .40 caliber
13 handgun was the gun that was used to fire the casings on the
14 crime scene of Greenmount --

15 THE COURT: Why is that relevant? Not relevant to
16 this motion, is it?

17 MR. MARTINEZ: It's relevant to the -- it ties the
18 gun back to the shooting the sergeant testified about.

19 THE COURT: Yeah, but this is a motions hearing and
20 the fact that it turned out to be right doesn't tell us
21 anything about the legitimacy of the process by which it was
22 found.

23 MR. MARTINEZ: Fair enough, Your Honor. But it -- I
24 think goes to the credibility of law enforcement's suspicion
25 that there was evidence in the home that could have been

1 destroyed at the time they were using the cell site simulator
2 to locate Mr. McCants in the house.

3 THE COURT: Well, it's not going to -- at this point
4 anyway, but I make the point just to keep our attention
5 focused on what matters here.

6 Go ahead -- the point is we don't decide suppression
7 questions around the issue of the probativity of the evidence
8 that was ultimately uncovered. That's the small point I'm
9 trying to make here.

10 MR. MARTINEZ: I understand that, Your Honor.

11 Q (BY MR. MARTINEZ) All right. Sergeant, I want to go
12 back to the evening of February 5th while you were executing
13 the first search warrant after McCants had come out of the
14 house.

15 MR. MARTINEZ: And Your Honor, just for the record,
16 this pertains to a separate motion that will be taken up
17 later. But while we have the sergeant on the stand, just like
18 three questions.

19 THE COURT: Yes. Whose motion is this?

20 MR. MARTINEZ: It's Mr. Francomano's. It's to
21 suppress the search of the Honda that was parked outside.

22 THE COURT: Okay. So --

23 Q (BY MR. MARTINEZ) Sergeant, on February 5th, 2017, did
24 there come a time where you requested a K-9 scan of a silver
25 Honda parked next to 5617 Pioneer Drive in the driveway?

1 A Yes.

2 Q Was the K-9 scan conducted on that car as you requested?

3 A Yes, it was.

4 Q If I can get the document camera back up on the screen
5 here. Is this the vehicle here in the driveway?

6 A Yes, sir.

7 Q What was the result of the K-9 scan, were you informed of
8 that?

9 A Positive alert for drugs.

10 Q And so based on that positive alert, did law enforcement
11 then search the car?

12 A Yes.

13 MR. MARTINEZ: Court's indulgence.

14 THE COURT: Yes.

15 MR. MARTINEZ: No further questions.

16 THE COURT: Thank you, Mr. Martinez.

17 Mr. Francomano.

18 MR. FRANCOMANO: Thank you, Your Honor. If I can
19 actually go to the podium --

20 THE COURT: Wherever you're more comfortable.

21 MR. FRANCOMANO: Thank you.

22 CROSS-EXAMINATION

23 BY MR. FRANCOMANO:

24 Q Good afternoon, Sergeant, how are you today?

25 A Great. How are you?

1 Q Good. Before you requested the tracking on the phone,
2 the only information you had was from these phone calls; is
3 that correct?

4 A No.

5 Q What other information did you have before you requested
6 the exigent work order?

7 A We had had the bar shooting of Deandre Dorsey, the
8 ballistic information for that gun that was recovered, and
9 other violent acts that had occurred.

10 Q Okay. But those are acts that occurred prior; correct?

11 A Correct.

12 Q Okay. So there was nothing that Mr. McCants was involved
13 in prior; correct?

14 A There was.

15 Q One of the shootings that you just talked about?

16 A Yes. There was more than -- the investigation took place
17 over a period of six years, once I had coordinated the
18 investigation with the Anne Arundel County FBI team, and we
19 believed that Marquise McCants was this person using that
20 phone --

21 Q You believed?

22 A Yes.

23 Q Okay. But nothing recent within the same day; correct?
24 Within December; is that correct?

25 A When the calls on February 4th -- if you're saying just

1 that, yes, the calls are what we're --

2 Q I'm sorry. Maybe I'm not being clear. The incidents
3 that you were talking about prior to just the phone calls that
4 you spoke -- there were other things besides just the phone
5 calls that you just spoke about?

6 A Yes. Once we believe it is Marquise McCants, then
7 everything comes into play, all that evidence that we've come
8 across, the violent acts Marquise McCants has been involved
9 in, all the murders.

10 Q When did you find out it was Marquise McCants?

11 THE COURT: When did you find out or when did they
12 come to suspect it? They didn't come find it out until they
13 ID'd him positively after his arrest.

14 Q (BY MR. FRANCOMANO) When did you suspect it was Marquise
15 McCants on the phone?

16 A On February 4th, 2016, had a conference call with the
17 investigators, and we went over that the phone number of
18 (410) 694-1321 in communication with Deandre Dorsey, played
19 those calls, and discussed how the voice sounded like Marquise
20 McCants, then the involvement with that BGF gang along
21 Greenmount Avenue, and along with calls where the
22 (410) 694-1321 was referred to as Digga, the street name that
23 Marquise McCants has within that Black Guerilla Family gang.
24 So it was the geography, tone of his voice, and the
25 nickname.

1 Q So was that on the first call on February 4th?

2 A February 4th.

3 Q February 4th, 2017?

4 A Well, the information about Digga was prominent in the
5 call on February 1st. The discussion with all the
6 investigators involved to identify who that person -- who we
7 believed that person to be using that phone was February 4th,
8 early in the morning hours.

9 Q Early in the morning hours?

10 A Yes.

11 Q Prior to that first call at 2:00 p.m. on February 4th;
12 correct?

13 A Correct.

14 Q So once you found out or believed it was Mr. McCants, did
15 you try and locate him?

16 A Yes.

17 Q What did you do to try and locate him?

18 A So myself and Detective Neptune were positioned at one
19 end of the block where McCants had used an address in the 400
20 block of East 28th Street. Other investigators were
21 positioned along Greenmount Avenue. Then there was a team of
22 FBI and Marshals that were positioned in different areas where
23 we suspected that Deandre Dorsey may be and could lead us to
24 Marquise McCants.

25 So we had a team of over 20 people with our surveillance

1 operation as well as that information was put out to uniform
2 patrol in the area.

3 Q I want to direct your attention to the call on January
4 26, 2017, that 11-minute call.

5 A Yes, sir.

6 Q Do you remember that call -- I'm sure you probably went
7 over these things a hundred times, the phone calls, the
8 transcripts or all the line sheets; is that correct?

9 A Yes, sir.

10 Q So you're very familiar with it. If you need to, I can
11 have his honor give you the line sheets.

12 A I have Pioneer Drive as the photo that's showing right
13 now, Your Honor.

14 MR. FRANCOMANO: If I could have my line sheets
15 back.

16 THE COURT: I will pass the line sheets back to
17 Mr. Francomano. First of all, make sure there's only line
18 sheets in there. Make sure we didn't sweep any other
19 documents in there.

20 MR. FRANCOMANO: Thank you, Your Honor.

21 Q (BY MR. FRANCOMANO) The 26th of January, they're talking
22 about a dice game; right?

23 A Yes, sir.

24 Q And when they're talking about the dice game, they're
25 talking about rolling dice and shooting dice; correct?

1 A Possibly. But in this situation they were talking about
2 robbing the dice game and then went into the discussion of
3 shooting.

4 Q And when they talked about robbing the dice game, they
5 were laughing and it was obviously a joke; correct?

6 A No, it was not a joke.

7 Q And then you said you interpreted the word "glizzy" to be
8 a gun?

9 A Yes, sir.

10 Q So glizzy couldn't be anything else?

11 A Not in the context that they were using it.

12 Q Well, in the context they were using it as a dice game,
13 couldn't it have been dice, money, a lucky rabbit's foot?

14 A Well, rob the dice game with the gun, which is later
15 described as "the big one," the "21," which is the Glock 21
16 model of a .45 caliber handgun.

17 Q Are you familiar with a dice game called 21?

18 A No.

19 Q And then in the transcript it also said a shootout with
20 Burns?

21 A Yes, sir.

22 Q Once again, dice, shootout. You see where I'm going with
23 this?

24 A No, I don't. I believe it was a shootout with someone,
25 of a person.

1 Q You believe --

2 A Yes, that's what I believe.

3 Q I'm showing you what's marked for identification, line
4 sheets. And this is --

5 THE COURT: Are we going to mark and admit these
6 line sheets, Mr. Francomano?

7 MR. FRANCOMANO: Yes, Your Honor. This is going to
8 be McCants Defense Exhibit No. 1.

9 THE COURT: McCants No. 1.

10 MR. FRANCOMANO: Going to make this actually 1A.

11 THE COURT: 1A.

12 Q (BY MR. FRANCOMANO) All right. These line sheets, can
13 you see this, Sergeant?

14 A Yes, sir.

15 Q All right. It says, "DI," then it says "DD." What does
16 UI mean?

17 A Unintelligible, according to the person who's typing the
18 line sheet.

19 Q Okay. And then it says, "UI with f-word Burns and them."
20 So that means unintelligible again?

21 A Unintelligible to whoever typed the line sheet, but
22 sometimes if I listen to the call, I may hear something that
23 that person who's monitoring may not.

24 Q So you hear something different; correct?

25 A I may be able to hear it better than that person.

1 Q There's a call on February 1st, 2017. Do you remember
2 that call?

3 A Yes.

4 Q And that's a call where you testified that you saw him
5 clutching -- or that allegedly Mr. McCants saw someone
6 clutching?

7 A Yes.

8 Q And you interpreted that to mean that he saw somebody
9 with a gun?

10 A Yes.

11 Q And your actual testimony was McCants went to Greenmount,
12 saw a person, wanted to shoot that person, and that person was
13 potentially armed. McCants called about TB and having someone
14 as backup. Other person around was TB. Is that your
15 testimony?

16 A Yes.

17 Q This is going to be 1B. Defense McCants --

18 THE COURT: Let me see counsel at the bench.

19 (Bench conference on the record.)

20 THE COURT: So we're at the bench. Mr. Francomano,
21 I guess I'm having trouble understanding ultimately where all
22 of this goes. Even if you start scoring points here, which
23 I'm not saying you are doing or you aren't doing, but
24 Mr. McCants has a warrant out for his arrest through this
25 entire period of time.

1 MR. FRANCOMANO: Right.

2 THE COURT: Okay. So they are operating on hunches,
3 they have incomplete information, they get lucky with some
4 suspicions and so forth. And they ultimately, if they
5 encounter him pretty much by any means, they're entitled to
6 take him into custody; right?

7 MR. FRANCOMANO: I would agree with that, if they
8 encounter him, not if they are without a warrant.

9 THE COURT: So what's the remedy, he gets released?

10 MR. FRANCOMANO: Well, the remedy in this case?

11 THE COURT: Yes, the remedy in this case. I mean,
12 ultimately, they're trying to find a fugitive, and they found
13 the fugitive. Okay. And let's suppose that their methods
14 were unconstitutional.

15 MR. FRANCOMANO: Yes, which I'm going to argue.

16 THE COURT: I detect that. Five minutes before 5:00
17 and I figured that out. Okay. So we -- suppose that they
18 are.

19 MR. FRANCOMANO: Well --

20 THE COURT: Once they lay eyes on him through a
21 window at Pioneer Drive, they have the lawful right to enter
22 that house on the strength of the arrest warrant and apprehend
23 him, don't they?

24 MR. FRANCOMANO: No, I would disagree with that.

25 THE COURT: Okay. So if they had suddenly had a

1 moment of constitutional clarity, as they stood on the porch
2 and gazed through the basement window, and then all of a
3 sudden, I'm Sergeant Landsman, I'm remembering this Fourth
4 Amendment course that I took at a recent seminar. I need at
5 this moment to just call everybody off, through a central
6 processing unit wipe on my brain as to everything I've just
7 seen and noticed, and we all go home and start over tomorrow.
8 Eight hours, ten-hour head start, maybe 12, I mean, what would
9 the law require?

10 MR. FRANCOMANO: Your Honor, the question is whether
11 or not there were exigent circumstances for them to get in the
12 house. If he was on the street and they found him on the
13 street and there was an arrest warrant for him, absolutely,
14 they could pick him up. The question is, can they go into a
15 house with just an arrest warrant --

16 THE COURT: But it's not -- they can always go into
17 a house with just an arrest warrant if they have probable
18 cause to believe that the guy that's the subject of the
19 warrant is in there before they go in the house.

20 MR. FRANCOMANO: Right. But they haven't -- at that
21 point they don't know who -- Mr. McCants is in there until, as
22 Your Honor said, he was arrested.

23 THE COURT: Well, they peeked through the window and
24 saw.

25 MR. FRANCOMANO: How did he know it was Mr. McCants?

1 THE COURT: He said he did.

2 MR. FRANCOMANO: Your Honor, I think that what you
3 said is more correct, that they didn't know who it was until
4 he was arrested.

5 THE COURT: Until they took his fingerprints they
6 didn't know for 100 percent. That's for sure.

7 MR. FRANCOMANO: I agree with that. But what we're
8 saying is that even if there -- there still has to be a reason
9 to get in the house, and there still has to be a reason to
10 track him. You can't all of a sudden say, well, these random
11 phone calls, which I'm trying to show, nobody can understand
12 them, number one. Number two, how does that show that there
13 are exigent circumstances for them to try and find
14 Mr. McCants? If he had a warrant out for him, they should
15 have applied for a warrant, and I think that that would have
16 been fine.

17 THE COURT: Well, what about the notion -- well, we
18 are not at the end yet. I'll let you continue. But I
19 understand exactly the road you're going down.

20 MR. FRANCOMANO: You're just trying to speed me
21 up.

22 THE COURT: Not necessarily. My question is though,
23 whether or not there isn't a bypass around -- you can go
24 through Wilmington, Delaware two ways; right? You can go
25 through on that really slow road that's always backed up, or

1 you can also go around the other way. Both get you to the
2 same place. I just want to make sure that the other road
3 isn't open. You're suggesting that there's enough question
4 about it that we ought to drive through town.

5 MR. FRANCOMANO: I understand what Your Honor's
6 saying.

7 THE COURT: Whatever. I mean, I'm not cutting you
8 off. I just want to make sure that we're not missing
9 something.

10 MR. FRANCOMANO: We will get there.

11 THE COURT: Thanks.

12 (The following proceedings were had in open court.)

13 THE COURT: Mr. Francomano, you may continue.

14 MR. FRANCOMANO: Thank you, Your Honor.

15 Q (BY MR. FRANCOMANO) Detective, there was a call on
16 2/4/17, that was the one where they said "dirt bike"?

17 A Yes, sir.

18 Q You interpreted that a dirt bike has to be a gun?

19 A Yes, sir.

20 Q It can't be a dirt bike?

21 A Not in this context.

22 Q Okay. You're aware that there were issues with dirt
23 bikes in Baltimore City; correct?

24 A Correct.

25 Q Okay. A call on February 4th at 4:09 p.m., that call you

1 stated that if you're going to get him -- you say that that
2 call was in reference to Mr. McCants and Mr. Dorsey going to
3 get someone; correct?

4 A I don't have the call up here that you're referring to.

5 Q This will be -- this is the call on which -- 4:09, this
6 will be 1C.

7 THE COURT: Are we going to play a call or what?

8 MR. FRANCOMANO: Your Honor, if I could play the
9 call. It's just a call that is less than a minute.

10 THE COURT: Yes. Do you need the government's
11 assistance to play it?

12 MR. FRANCOMANO: No, Your Honor, I've got it over
13 here.

14 THE COURT: Okay.

15 MR. FRANCOMANO: Can you hear that?

16 THE COURT: Loud and clear.

17 (Audio played.)

18 Q (BY MR. FRANCOMANO) Detective, that call is from --
19 actually, 4:12. Do you remember that call?

20 A Yes.

21 Q The first sentence out of his mouth is -- actually, the
22 first sentence is "Hello." The next one is -- it says, "Lucky
23 day because he damn sure ain't out here"; correct?

24 A Right.

25 Q And then there are two calls after that; correct?

1 A Yes.

2 Q Let me play those for you.

3 (Audio played.)

4 Q (BY MR. FRANCOMANO) And Detective, that call was at
5 4:33 p.m. on the same day; correct?

6 A Yes.

7 Q And in that call, they weren't talking about guns, were
8 they?

9 A It's drug talk.

10 Q So nothing about guns?

11 A No, but --

12 Q No imminent threat to anyone?

13 A No, but it put us in a position where we believed that a
14 meet was going to occur.

15 Q A meet for drugs?

16 A Yes, but we believed that Deandre Dorsey was going to
17 lead us to who we believed to be Marquise McCants.

18 Q For drugs?

19 A Well, it would have been to disrupt the violent acts that
20 were going to occur, but yeah, in between that they do sell
21 drugs, so that would have occurred. But our function would
22 have been to disrupt someone from getting killed, so -- and we
23 would have seized the drugs.

24 Q So the next call is at 5:01 on the same day.

25 (Audio played.)

1 Q (BY MR. FRANCOMANO) That call is at 5:01. Are they
2 talking about any imminent threats to anyone in that one?

3 A Just drug talk.

4 Q Nothing that was a gun; right?

5 A Correct.

6 Q What time did you, I guess, request the exigent
7 circumstances order?

8 A Well, I began talking to the Advanced Technical Team
9 after 9:00 o'clock.

10 Q 9:00 p.m.?

11 A Yes, sir.

12 Q And in that order -- actually, two orders. There's an
13 exigent work order form, and that would be 1D, Defense
14 McCants. Do you see that, Detective -- or excuse me,
15 Sergeant?

16 A Yes, sir.

17 Q What is that?

18 A The cover sheet for the request with the synopsis in
19 there. And that is the request that I send to the Advanced
20 Technical Team with my synopsis. So when I forwarded the
21 information, this is the document that I prepare that
22 information on. And you see below at the bottom where it says
23 signed, that's my name and my Baltimore police sequence number
24 G692 and then the number. Once that document is forwarded to
25 Tony Clark, then Tony Clark prepares the order, which he

1 forwards to the cell phone company.

2 Q And that's the one you sent over at 9:00 o'clock;
3 correct?

4 A Yes.

5 Q And in that document you stated that there was an
6 imminent threat; correct?

7 A Yes.

8 Q Even after you heard that no one was on the street and
9 the two were talking about a drug deal?

10 A The threat was still there, that the drug transactions
11 were going to occur. They were selling drugs as part of their
12 organization, but the threat was still there. We did not
13 disrupt the threat that was going to occur on that weekend.

14 Q Detective, you spoke about that you heard and you
15 received information that Mr. Bess was shot. What time was
16 that?

17 A 10:50 p.m.

18 Q When did you receive the information?

19 A It was about 10:50 p.m.

20 Q Who did you receive it from?

21 A From the Advanced Technical Team's Lieutenant Fries, was
22 the first person that notified me at the same time that I
23 received the GPS location data.

24 Q Now, so you heard that at 10:50 p.m.; correct?

25 A Correct.

1 Q And you explained to the judge that you did not request a
2 warrant because that would take too long; is that correct?

3 A No. It was -- the complete issue was that it would take
4 too long. It was a couple different issues being combined.
5 One being the cell phone company responding to the
6 order once -- once it is signed -- if we did get that signed,
7 that would have been an issue in itself, preparing it, going
8 to the judge.

9 And then I think the next issue was the cell phone
10 company responding to the order in the time that we needed it,
11 which may not have been until that Monday.

12 Q Okay. So it was, I guess, a two-step problem, the judge
13 not responding in time and then the cell phone company not
14 responding in time?

15 A And then the information of the threat where someone was
16 going to get killed, which was time sensitive.

17 Q And then you did get a search warrant on 2/5 that you
18 testified to; correct?

19 A Correct.

20 Q And in that search warrant you filled out an affidavit;
21 correct?

22 A Correct.

23 Q And in that affidavit, I'm sure you put in there that
24 somebody was shot on that night; correct?

25 A Yes, sir.

1 Q Then there was --

2 MR. FRANCOMANO: Court's indulgence.

3 THE COURT: Yes.

4 Q (BY MR. FRANCOMANO) And there was a search warrant on
5 February 8th; correct?

6 A Correct.

7 Q And that search warrant -- I'm sure you put in there that
8 there was an individual that was shot?

9 A Yes.

10 Q Are you guessing?

11 A No, I'm sure we put that in there.

12 Q I'm showing you what the probable cause section is in
13 that search warrant, so I'll mark the entire search warrant as
14 Defense McCants Exhibit No. 1E.

15 Can you read that, Sergeant?

16 A Yes, sir.

17 Q Do you see in that section anywhere where it says an
18 individual that was shot?

19 A It does not.

20 Q Showing you page 2 of the probable cause. Please review
21 that.

22 A Okay. I reviewed it.

23 Q And where does it say that someone was shot?

24 A It does not.

25 Q Detective, in the search warrant for February 5th, you

1 identified a criminal informant -- a reliable criminal
2 informant; is that correct?

3 A Yes.

4 Q I'm not asking you who that criminal informant is, but is
5 it a human being?

6 A Can I see the probable cause?

7 Q Absolutely.

8 THE COURT: Point to the reference, please.

9 Q (BY MR. FRANCOMANO) The first paragraph. And this will
10 be Defense 1F.

11 A On February 4th, 2017, members of the Baltimore Police
12 Department and FBI Task Force received information from a
13 confidential and reliable source that an individual known as
14 Digga has gone to shoot someone in the area of Greenmount
15 Avenue. The confidential source indicated that Digga was
16 going to shoot somebody today.

17 Q Is that a human being?

18 A The source at the time would be the wiretap.

19 Q So not a human being?

20 A Correct.

21 Q Detective, on June 19th, 2017, the Maryland Court of
22 Special Appeals found that you provided inaccurate
23 information; is that correct?

24 A I would say that's not correct, based on the modification
25 to that ruling.

1 Q The Court of Appeals found that you provided inaccurate
2 testimony; is that incorrect?

3 A That is incorrect, based on the modification that that
4 Court of Appeals ruled on.

5 Q Explain that to me.

6 A The Court of Appeals had limited information on my
7 response to that question. Once I provided the totality of
8 the circumstances, the ruling that my answer was inaccurate
9 was modified to my answer to that question was actually
10 correct for what I was responding to. And there is a
11 modification that has been completed since that initial
12 ruling.

13 THE COURT: What is this all about?

14 MR. FRANCOMANO: I'm sorry?

15 THE COURT: What is this all about?

16 MR. FRANCOMANO: There was a finding on July 19th,
17 2017 by the Court of Special Appeals that was turned over by
18 the government providing that Sergeant Landsman provided
19 inaccurate testimony in the state murder trial of David
20 Hunter, one of the co-defendants in this case.

21 THE COURT: Is there a modification that you're
22 aware of?

23 MR. FRANCOMANO: Not that I'm aware, Your Honor.
24 Not that I've been provided either.

25 THE COURT: Mr. Martinez?

1 MR. MARTINEZ: Mr. Francomano is referring to the
2 modified ruling, Your Honor. And we will stipulate that there
3 is a Court of Special Appeals opinion saying that he provided
4 inaccurate testimony.

5 THE COURT: Not clarified subsequently in the
6 modification to indicate that it was not inaccurate?

7 MR. MARTINEZ: The initial opinion, Your Honor,
8 which I believe was issued in May, took the unnecessary step
9 of having language in it purporting to characterize Sergeant
10 Landsman's mental state. And as I understand it, the
11 attorneys in the office of the Attorney General moved for
12 reconsideration of that, submitted an affidavit from Officer
13 Landsman, submitted transcripts of the testimony, and gave the
14 Court of Special Appeals some information about the context.

15 So the modification was simply to say that the
16 testimony was inaccurate as a factual matter without making
17 any pronouncements as to whether it was misleading,
18 deliberately inaccurate, et cetera.

19 What we're left with is a finding by the Court of
20 Special Appeals that there was testimony that was factually
21 incorrect.

22 THE COURT: Okay. You accept that interpretation,
23 Mr. Francomano?

24 MR. FRANCOMANO: Yes, Your Honor. I believe that's
25 the same question I asked him.

1 THE COURT: Okay.

2 MR. FRANCOMANO: I have nothing further for this
3 witness.

4 THE COURT: Do you have any other witnesses,
5 Mr. Francomano? Do you have any other evidence you intend to
6 present?

7 MR. FRANCOMANO: Your Honor, I do. Depending on
8 whether or not there's going to be an issue of standing, I do
9 have another witness.

10 THE COURT: I don't think there is going to be an
11 issue on standing. Mr. Martinez, do you have other evidence?
12 I understand that you have not conducted redirect examination,
13 but do you have other evidence on this motion?

14 MR. MARTINEZ: We have Detective Clark available to
15 the extent that there are factual disputes pertaining to what
16 he did. I think there's been a record made that he used the
17 cell site simulator to find the phone at 5617. That was going
18 to be the principle basis for his testimony. He was going to
19 testify as to a statement he heard outside the house. I don't
20 know whether --

21 THE COURT: Statement made where?

22 MR. MARTINEZ: Detective Clark was one of the
23 officers that was stationed outside the house. He stuck
24 around after using the cell site simulator.

25 THE COURT: Yes.

1 MR. MARTINEZ: So he heard Mr. McCants shouting from
2 inside the house, "I've got a gun, I've got an f-ing gun." I
3 don't expect that Mr. Francomano is prepared to concede to
4 that.

5 MR. FRANCOMANO: No, Your Honor.

6 THE COURT: Let's stop and hear Mr. Francomano's
7 argument with respect to matters leading up to the house and
8 the contact made with Mr. McCants at the house.
9 Mr. Francomano.

10 Mr. -- you may step down step and step outside.
11 Don't go anywhere.

12 MR. FRANCOMANO: Your Honor, as I stated at the
13 bench, this case is about whether or not the exclusionary --
14 whether there is an exclusionary rule as to the warrant, and
15 the only exclusion that I believe --

16 MR. MARTINEZ: Your Honor, I don't know what
17 warrant --

18 THE COURT: Not --

19 MR. FRANCOMANO: Not warrant.

20 THE COURT: The warrantless pursuit of Mr. McCants,
21 utilization of special technology that assisted the government
22 in determining his location.

23 MR. FRANCOMANO: Exactly, Your Honor.

24 THE COURT: Several instances on the evening in
25 question.

1 MR. FRANCOMANO: And from the case law, I don't
2 think there's an issue that this is a search. I think the
3 only issue here is whether or not the search in itself is an
4 exception to the warrant under exigent circumstances.

5 THE COURT: I think there's a huge question as to
6 whether or not these sorts of intrusions are searches. I
7 think it's a burning question. I'm not persuaded yet that it
8 needs to be resolved as part of the determination of the
9 motion that you've presented to the Court. But let's assume
10 it was a search and that legally it should be evaluated as a
11 search.

12 MR. FRANCOMANO: And that's what we would say, Your
13 Honor. We would say that there were not exigent circumstances
14 in this case. And it doesn't meet the criteria. This case is
15 different than other cases where there is exigent
16 circumstances in that this case is a preventative action.
17 This is not a case where something has happened, a crime has
18 been committed, and they're going to try to find someone.
19 It's not a reactive case, such as the other cases; rendering
20 aid to someone, preventing the destruction of evidence, risk
21 of flight, safety to police officers.

22 THE COURT: Well, in the second part of the story,
23 wasn't law enforcement taking actions in the wake of a
24 shooting?

25 MR. FRANCOMANO: In the wake of a shooting that they

1 have no idea who committed the shooting. But Your Honor,
2 that's not really the issue here. The issue is whether or not
3 when they applied for the warrant itself -- excuse me, not the
4 warrant, when they applied for the exigent circumstances
5 order, was there an immediate eminent threat. And the answer
6 is, no. At that -- there was nothing at that point, Your
7 Honor, and that's why we're saying that since there was no
8 exigency at that time, there was no reason for them to use the
9 cell site simulator to try and locate Mr. McCants. They went
10 above and beyond what they're required to do and what they're
11 allowed to do.

12 THE COURT: Okay. I understand the argument.

13 MR. FRANCOMANO: Like I said, this is a case where
14 they believe something is going to happen. Number one, we
15 don't think there's enough evidence to even show that there
16 was any type of exigent circumstances. It's clear from the
17 calls that if there was anything going on, it dissipated by
18 the second call. And the next two calls had nothing to do
19 with any type of emergency or imminent danger.

20 The officer -- excuse me, Sergeant Landsman
21 testified that there were no other calls -- or those two other
22 calls were dealing with drugs, not dealing with any type of
23 guns or any type of issues where someone could be harmed. And
24 that's our position, that right there, there's no exigency
25 whatsoever. The cases that were cited by the government all

1 talk about cases in which the exigency was reactive. And
2 *Warden Maryland Penitentiary versus Hayden*, that was hot
3 pursuit of an armed felon; *Kentucky v. King*, destruction of
4 evidence; *U.S. v. Caraballo*, that was another one, risk of
5 flight; *U.S. v. Ellis*, that was one where the risk of flight
6 in possession of firearms.

7 The only case that the government does talk about
8 where as a preventative issue for exigency circumstances is a
9 case called *U.S. v. Engel*. *U.S. v. Engel* is a 4th Circuit
10 case in which officers responded to a domestic violence
11 assault. When they got there, the wife had told them that the
12 defendant was still in the home threatening to shoot law
13 enforcement. The officers arrested the defendant when he came
14 out of the house.

15 The wife said there's a grenade in the house. The
16 officers go into the house, they go to a locked cabinet, they
17 opened up the cabinet. He was -- the defendant was the only
18 person who had a key to the cabinet and that court found that
19 them going in, and the Court stated that, "while we recognize
20 that preventive action may well be justified in the face of an
21 exigency, we conclude the factual circumstances of this case
22 simply do not rise to that level." And that's what we're
23 saying here, Your Honor.

24 There's a whole bunch of phone calls that show there
25 is no exigency, that the cell site simulator was not in a

1 situation where it should be used because there was no
2 exigency at that time. It is not an exception, and as we all
3 know, that the warrant has to be probable cause for the cell
4 site simulator.

5 MR. MARTINEZ: Objection again to any -- these
6 continued references to a warrant. Your Honor, there is no
7 warrant for the cell site simulator.

8 MR. FRANCOMANO: I apologize.

9 THE COURT: I'm following his argument. You may
10 continue.

11 MR. FRANCOMANO: And then the case that is most like
12 ours is *Moore v. City of Gaithersburg*. That's another 4th
13 Circuit case. In that case, at 1:00 p.m. a health care
14 operator on a suicide line got a call from a defendant who
15 said he was suicidal, had weapons in his apartment, and he
16 could understand shooting people at his work, and he might as
17 well die at work. At that time, the officers were called and
18 they said the defendant's threats should be taken seriously.
19 They called his work, they said yes, this definitely could
20 happen. The officers heard that the girlfriend had just
21 broken up with him.

22 The officers arrived and saw that the defendant was
23 loading a suitcase into his car and a gym bag into his van.
24 The defendant was arrested at that time. The officers begin a
25 search of the bag, found a handgun. They took his keys and

1 went and searched his apartment. They found 41 guns.

2 Now, this case set out three factors in a situation
3 where there's a preventative issue just like our case. And
4 the three factors were, one, the likelihood or probability
5 that a crime will come to pass. In the *Moore* case, the
6 defendant himself said he was suicidal in the apartment and
7 could understand shooting people at his work. They spoke with
8 his work, they said yes, this is definitely something that
9 could happen, discovered his girlfriend had broken up with
10 him. It was an imminent situation. In our case, there's been
11 no showing of any imminency whatsoever.

12 How quickly the threatened crime might take place?
13 Imminent. In our case, the individual -- they said in a call
14 the individual was not on the street. And the call 2/4 -- on
15 February 4, 2017 at 2:12 or 4:12 p.m., and then two other
16 phone calls talking about drugs. And finally, the third
17 category, the gravity of the potential crime. Obviously, in
18 the *Moore* case the gravity is mass murder.

19 In our case, according to the phone calls, there is
20 no idea what crime is going to be committed. It could have
21 been the last two phone calls maybe drugs. We don't know.
22 *Moore* court found when the crime is extreme and the need to
23 prevent is great, as with potential mass murder, the
24 constitutional questions take on a special urgency and a
25 certain novelty.

1 In the present case, as I said, the government is
2 relying on five phone calls. And in those five phone calls,
3 as we've gone through ad nauseam, the phone calls do not show
4 there's any imminent threat. Do not show that -- if they show
5 that there was a threat on the call, the 4:09 call, they show
6 that threat was dissipated in the 4:12 call and in the 4:33
7 call and the call at 5:00 o'clock. There was no imminent
8 threat.

9 This is clearly a situation in which the officers
10 are making a number of subjective assumptions about what they
11 believe is going on, what's going to happen. They have to be
12 objective reasonable assumptions. In these phone calls
13 there's no way to pinpoint the fact that a murder was going to
14 take place. Here they're guessing, taking coded words to make
15 them mean what they want them to mean. Your Honor, sometimes
16 a dirt bike is just a dirt bike.

17 What *Moore* -- what the case of *Moore* was telling us,
18 and the last remark I think is kind of telling, it says --
19 when *Moore* said, "I might as well die at work," the Court
20 found that this was ambiguous. But the other facts such as
21 him saying he was suicidal, that he had weapons at his
22 apartment and things like that, they found that those things
23 would all confirm it. Every single one of these phone calls
24 is ambiguous. And if not, like I said, the one -- the 4:12
25 phone call shows that there was no longer any type of threat

1 whatsoever. That's our argument as to the exigency, Your
2 Honor.

3 THE COURT: Thank you, Mr. Francomano.

4 MR. FRANCOMANO: Thank you, Your Honor.

5 THE COURT: I have carefully considered the evidence
6 that's been presented. I've considered Mr. Francomano's
7 argument. Here's how I see it: I do believe there was an
8 exigency. I believe that it evolved from a reasonable and
9 objective interpretation of the totality of the phone calls,
10 considered together on the day in question and the
11 consultation that occurred among all of the investigators
12 earlier -- early in the morning on the 4th; and that the total
13 picture that emerged and developed over the course of the day,
14 particularly late in the day, was one of exigent
15 circumstances; and that a malignant situation was apparent to
16 reasonable and objective law enforcement officers; and that in
17 light of that they were authorized to dispense with the
18 requirement, if there was one, to get a warrant in those
19 circumstances, before deploying that special Stingray cell
20 site simulator technology and begin their pursuit of
21 Mr. McCants.

22 As the situation developed, after the shooting
23 occurred, the Court -- I'm prepared to conclude that they
24 actually found themselves to be in the exigent circumstance of
25 the hot pursuit of an armed felon and that they proceeded

1 accordingly. My problem with the government's side of this
2 though, begins not too long after that. And the explanation
3 given from the stand about why they were not pursuing a
4 warrant with a court simultaneous with their pursuit and their
5 pursuing the exigent circumstances authority to get the
6 information is not persuasive to me at all. And they should
7 have been simultaneously making their best efforts to get a
8 warrant.

9 And the fact that they did not do that or were
10 failed in doing that is not going to carry the exigent
11 circumstances argument forward indefinitely. However, I do
12 conclude that law enforcement got to the Pioneer Drive address
13 and got onto the likely presence of the defendant and the
14 phone at that address, while they were still within the scope
15 of the exigency and what it justified without a warrant.

16 Now, to the extent that they continued to use the
17 cell site simulator while they were at Pioneer Drive to
18 confirm the presence of the telephone there and then, perhaps
19 the defendant there as well, the lawfulness of that need not
20 be addressed by the Court for the reason that I find that they
21 initially got to Pioneer Drive within a period of time that is
22 covered by the exigency of the circumstances that had
23 developed through the evening while they were listening to the
24 calls and then the shooting and so forth.

25 Certainly the 11:20 p.m. locating of the phone at

1 the Pioneer Drive location falls within the scope and the
2 reach of the exigency. The exigency gives law enforcement
3 access to the information that the phone was at Pioneer Drive.
4 And I find that once they were there, they were -- it was
5 likely, to the point of certainty, that they were going to
6 remain there, even if they -- cell site simulator broke at
7 that point and would no longer function. They were going to
8 continue to pursue that information until they ascertained who
9 was inside of that house. And therefore, any additional use
10 of the cell site simulator at that location as more time
11 elapsed, and as I find they were then falling at some point
12 out of the period of exigency, really just doesn't matter
13 here.

14 Mr. Martinez, the testimony about not pursuing a
15 search warrant in the circumstances that the officers found
16 themselves in is crazy. And --

17 MR. MARTINEZ: Your Honor, if I may.

18 THE COURT: -- a mistake.

19 MR. MARTINEZ: I can proffer to the Court, and
20 Sergeant Landsman had been permitted to testify on redirect,
21 we could have clarified that a bit. I can tell the Court I
22 was up with these guys that night and I was working on a
23 tracker affidavit. To the extent there was a delay here, it
24 was because of me and because I was hesitating. I didn't want
25 to get evidence suppressed, and so I was telling these guys

1 don't go ahead with the exigent. So the time that passed
2 between 4:00 and 5:00 o'clock when these guys called me and
3 said, hey, we think this is about to happen, that's me telling
4 them --

5 THE COURT: You can't put yourself into the
6 equation, Mr. Martinez, and I'm not going to consider any of
7 that. You're a prosecutor in the case. You're not a witness.
8 My point is, I heard what I heard from the witness stand from
9 the witness about what his thinking was and his reasoning was.
10 You might have heard it too, and said no, he doesn't know
11 everything that was going on. All I'm commenting on is the
12 explanation that was given here, and that explanation is
13 inadequate.

14 It's -- as it turns out, it's not going to hurt the
15 government in this case. But it certainly could have, and it
16 could in the future. The notion that it takes the telephone
17 company much longer to react to the issuance of a court order
18 and a court warrant than it does to a direct request claiming
19 exigent circumstances from the police is highly problematic.

20 It may not be the total picture. I accept that,
21 Mr. Martinez. There may be more to it, but you heard the
22 testimony that I heard. And that's at least what the
23 sergeant's understanding was of why there was not much utility
24 in his mind in pursuing a warrant that night. I know that
25 judges are on duty 24/7 in the city to accept warrant

1 applications. And it's up to law enforcement and the
2 government to ensure that private companies that provide these
3 kinds of services are in a position to react to the issuance
4 of such warrants.

5 And there's no reason to believe that they aren't
6 and can't, given the fact that they evidently will react
7 instantaneously to a request that comes directly from law
8 enforcement. The -- what I'm reacting badly to is the
9 suggestion that a court order won't get as prompt attention as
10 will a request from law enforcement where exigent
11 circumstances are claimed. If there's more to the story than
12 that, then maybe you have nothing to worry about. I'm ruling
13 in a case, and I'm ruling based on the information that's in
14 front of me. I have found that the exigency that I found to
15 exist in this case was of sufficient duration and still in
16 effect, such that law enforcement getting to Pioneer Drive
17 fits within the scope of that exigency.

18 Now, once law enforcement is at Pioneer Drive,
19 they're going to stay there until they get this situation
20 sorted out. And that includes a knock on the front door,
21 peering through the basement window to see someone who
22 resembles the defendant scurrying around. The defendant then
23 coming to a window and potentially considering exiting the
24 building through that window, then having second thoughts.
25 And that's as far as we have gone with the story.

1 But those are my rulings to this point. There -- I
2 will also rule that there -- it's without dispute that there
3 was a valid arrest warrant for this defendant at the time that
4 law enforcement was at the house. I find that they had, from
5 the information that they had acquired, probable cause to
6 believe that this defendant was then inside of that house.
7 And given that, they technically didn't need a search warrant
8 to go in there. They had a valid search warrant for someone
9 who they had probable cause to believe was inside a private
10 space, a home. And they were entitled to go in there and go
11 after him.

12 So those are the rulings to this point in the
13 sequence. Now, I understand there's a statement issue about
14 something that was allegedly made. There's a factual dispute
15 about that. It's 22 minutes before 6:00 o'clock in the
16 evening. We're not in the position to take anymore evidence
17 this evening.

18 MR. MARTINEZ: Your Honor, and I think based on the
19 Court's ruling so far, I don't think further testimony about
20 that statement is necessary to resolve this motion.

21 THE COURT: Well, I think there's a -- well, I guess
22 there's a dispute as to whether the statement was made, but
23 that's a trial issue; right, Mr. Francomano?

24 MR. FRANCOMANO: Your Honor, I would agree with
25 that.

1 THE COURT: So any motion to suppress the statement
2 is denied now, because it would have been fruit of some prior
3 illegality under the -- under Mr. Francomano's theory that the
4 primary illegality is not found to have been an illegality.
5 So now you're down to a factual dispute about whether it even
6 happened.

7 MR. FRANCOMANO: That's correct. It's not a
8 constitutional issue, it's just --

9 THE COURT: I understand. So the motion to suppress
10 the statement, whatever number that is --

11 MR. FRANCOMANO: There was no motion to suppress the
12 statement. I was just talking about the statement in that
13 motion.

14 THE COURT: Okay. So we're done for today with this
15 exception.

16 Mr. Martinez, where are we in terms of the totality
17 of the motions, what have we got left to deal with tomorrow?

18 MR. MARTINEZ: So, Your Honor, there are two --
19 three more motions that require the taking of testimony and
20 they will all be fairly brief. Mr. McCants has filed a motion
21 to suppress the search of the vehicle outside of 5617.

22 THE COURT: The Accord.

23 MR. MARTINEZ: The K-9 officer is prepared to
24 testify that he ran the scan and it was positive. It will
25 take a few minutes.

1 THE COURT: Okay.

2 MR. MARTINEZ: Mr. Harvey has filed a series of
3 motions challenging arrests and seizures of drug evidence from
4 him. I think there are three separate arrests at issue.

5 THE COURT: So we have officers or agents in
6 relation to those?

7 MR. MARTINEZ: Correct, Your Honor. I think there
8 are three law enforcement witnesses and they'll all be brief.
9 And finally, Mr. Bonds has challenged the seizure of a firearm
10 from his vehicle after a traffic stop in October 2013, and the
11 officer who conducted that stop is prepared to testify. So in
12 total, I believe we're looking at five very brief witnesses.
13 I totally expect we ought to be able to cover them in two
14 hours or less. And then every remaining motion after that, we
15 submit, can be decided on the papers based on the order.

16 THE COURT: Legal argument only with the severance
17 motions, counsel, what's on your minds, is there anything
18 that's been skipped in this brief summary of what's left for
19 tomorrow?

20 MR. FRANCOMANO: Your Honor, there was a motion that
21 I filed, a supplemental to the warrantless search of the house
22 of 5617 Pioneer Drive.

23 THE COURT: The second search?

24 MR. FRANCOMANO: Correct.

25 THE COURT: The gun search, the search that

1 allegedly discovered the gun.

2 MR. FRANCOMANO: No, actually, Your Honor, there was
3 a protective sweep.

4 THE COURT: Yes, there's a protective sweep.

5 MR. FRANCOMANO: Correct, after Mr. McCants was
6 arrested.

7 THE COURT: Right.

8 MR. FRANCOMANO: And that issue --

9 THE COURT: They said they found something in plain
10 view.

11 MR. FRANCOMANO: Correct.

12 THE COURT: They say they then went and got a
13 warrant.

14 MR. FRANCOMANO: Correct.

15 THE COURT: They went back in and seized what they
16 found in plain view; drugs, paraphernalia, .40 caliber shells,
17 no gun.

18 MR. FRANCOMANO: Correct.

19 THE COURT: That's the end of that search. Then
20 they claimed that they intercepted a communication of some
21 sort and that prompted them to submit another affidavit to
22 another judge to get a warrant to go back on -- well, they got
23 the warrant on the 8th and went back on the 9th.

24 MR. FRANCOMANO: Went back on the 8th.

25 THE COURT: Thought they actually executed on the

1 9th, but whatever. Then they claim they found the gun in the
2 wall by accessing it through the little porthole in the sink
3 area.

4 MR. FRANCOMANO: Correct.

5 THE COURT: So what remains to be resolved is the --
6 the whole story of the protective sweep leading to a search
7 warrant, leading to another warrant, and whether or not there
8 was some illegality in there.

9 MR. FRANCOMANO: Exactly, Your Honor.

10 THE COURT: Okay. So whose testimony is necessary
11 for that?

12 MR. FRANCOMANO: I guess Detective Landsman, whoever
13 went in the house for the protective sweep.

14 MR. MARTINEZ: The sergeant has testified as to why
15 he went in, what he was expecting, what the purpose of the
16 sweep was, and what he saw when he was in there.

17 THE COURT: Yes, I did hear that testimony. It
18 sounds like the government doesn't want to offer anything else
19 on it. Do you want to offer anything on it?

20 MR. FRANCOMANO: As to his testimony?

21 THE COURT: Yes, do you want any more evidence in
22 before you argue on it?

23 MR. FRANCOMANO: No, Your Honor.

24 THE COURT: We're not going to argue it tonight, but
25 it could be the first order of business tomorrow morning.

1 MR. FRANCOMANO: No, I don't need any more evidence
2 as to that.

3 THE COURT: All right. Tomorrow morning first thing
4 we will take up the question of the lawfulness of the
5 protective sweep after McCants had already been removed from
6 the house; why the officers go back in, what was their
7 justification for doing so, was that lawful? That then
8 equipped them with certain information that they otherwise
9 wouldn't have had. They put that into a search warrant
10 affidavit, got a search to go in, and actually seized what
11 they had previously seen. And then how that relates to the
12 subsequent search, you can develop that as well in your
13 argument, but that's what we'll take up first thing in the
14 morning.

15 MR. FRANCOMANO: Thank you, Your Honor.

16 THE COURT: All right. Thank you, Mr. Francomano.
17 Is that it, did we -- so with all that in mind, Mr. Martinez,
18 your projection for tomorrow, three to four hours of court
19 time?

20 MR. MARTINEZ: That depends somewhat on how long
21 Your Honor wants to spend on legal argument. But I think
22 that's fair. If we make it through the witnesses efficiently,
23 I do think it's possible we can be done in four hours.

24 MS. HOFFMAN: There are also motions to suppress
25 social media evidence and there are a couple other search

1 warrants that have been challenged.

2 THE COURT: All right. We'll still assume that
3 we've got all day tomorrow. The Marshals should make that
4 assumption also. Anything else we need to address this
5 evening on the government's side?

6 MR. MARTINEZ: Not from our point of view.

7 THE COURT: From defense counsel?

8 MR. DAVIS: Nothing, Your Honor.

9 THE COURT: The defendant's are remanded to the
10 custody of the Marshal. Counsel are excused. Court's in
11 recess. Thank you.

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